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The Supreme Court of Arkansas has recently been called upon to struggle with the question as to the constitutional power of the legislature to limit or restrict the right to contract. The case is Leep v. St. Louis I. M. & S. Ry. Co., 25 S. W. Rep. 75. The act in controversy is one of March, 1889, which requires corporations, companies, and persons engaged in the business of operating or constructing railroads and railroad bridges, and contractors and subcontractors engaged in the construction of any such road or bridge, to pay to their employees, on the day of discharge, the unpaid wages then earned by them at the contract rate, without abatement or deduction. The court while recognizing that under some conditions and as to matters clothed with a public interest, the legislature has power to restrict the right to contract, declared that when the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof, that the right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended, since this would subvert the right to enjoy liberty, to acquire property, and to pursue happiness, declared tobe in alienable rights by Const. art. 2, § 3, and that the legislature cannot make it unlawful for individuals to agree with each other that wages shall be paid at any time after the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a given day after the sale, since such a contract, as to the time of performance, is necessarily harmless, and of purely private concern. It was therefore held that the act in question was void in so far as it applies to natural persons though valid in so far as it applies to corporations; this upon the ground that corporations derive their power to contract from the legislature, which retains the right to modify or restrict same. The view of the court on the main question as to the power of the legislature to restrict the right to contract is in line with the decided weight of authority. Hancock v. Yaden, 121 Ind. 366, and Peel Splint Coal Co. v. State (W. Va.), 15 S. E. Rep. 1000, are opposed to the current of cases on this subject but even they do not hold that the legislature has the absolute power to limit the right to contract. The distinction between natural persons and corporations in so far as the validity of the act is concerned, as made by the court, is not altogether without doubt, as will appear from the dissenting opinion of Bunn, C. J., who takes the ground that the act is entirely void.

Practitioners should make note of Trimmier v. Thomson, decided by the Supreme Court of South Carolina wherein it is held that an attorney who contracts for the printing of briefs is presumed to contract for himself and not for his client. Of course there is no new law in this, but it is valuable to attorneys as a reminder of a possible liability which they have in their power to avoid. As the court says in the case referred to, the question of liabililty must depend upon the contract. If an attorney at law contracts with a printer to print his client's briefs and arguments, unless in such contract he stipulates that he is having such work done as the agents of his clients as his principals, he will be liable to pay for such work. It is true, an attorney at law is the agent of his clients, but only in the sphere of his agency in the transaction of his clients' law business. Such an attorney has no power, as such attorney, to bind his principal, except within the sphere of his special agency. If he acts beyond such sphere, he must have special authority, and to make his acts, as such special agent, binding on third parties, they must have notice of such special power. "When Mr. Thomson, as attorney, contracted with Mr. Trimmier for his printing, he was bound in law either to have contracted for himself or for another. The legal result is that such a contract is his, until he makes the contrary appear. To hold otherwise would require that courts should hold clients responsible for any contracts made by their attorneys, whether such clients authorized such contracts or not."

NOTES OF RECENT DECISIONS.

SCHOOL DISTRICT BONDS—VALIDITY—ACTION ON—DEFENSES.—In Flagg v. SchoolDistrict No. 70, 58 N. W. Rep. 499, the Supreme Court of North Dakota hold that an instrument providing for the payment of exchange on a point other than the place of payment, in addition to principal and interest, is not a negotiable instrument, and one who purchases the same before maturity, for value, and without notice of any defense thereto, nevertheless takes it subject to the defense of want of consideration good as between the original parties to the instrument. In this case defendant was authorized to issue bonds to fund its outstanding indebtedness in case certain statutory prerequisites were complied with. A record of the proceedings culminating in the decision to issue bonds was to be made in the district, and a certified copy thereof was to be filed with the county clerk, and preserved as a record in his office. It was made the duty of the county clerk to examine such record in his office, and if satisfied, from such examination, that all the requisites of the act with respect to the preliminary proceedings had been complied with, and that the bonds were authorized to be issued as provided for in the act, he was to register the bonds, and indorse upon each of them his certificate in the form prescribed in the statute. The bonds in questions were so registered and certified. It was held, that a purchaser of such bonds, for value, before maturity, and without notice that any of the conditions of the statute relating to proceedings to authorize the issue of the bonds had not been complied with, could rely upon the certificate of the county clerk as finally settling all such matters, and that the court below did not err in rejecting defendant's offer to prove that such conditions had not been complied with. By an amendment to the act, it was provided that no district, in which the title to the school site was not in the school board, should bond its debt until it had obtained such title. But it was declared in such amendment that, after the bonds had been registered and certified, their validity should not be questioned in any tribunal, but should be and remain valid and binding. It was held, that this provision made it the duty of the county clerk to pass upon this question of title before registering and certifying the bonds, and that, therefore, his decision, evidenced by registering and certifying the bonds, that such condition as to title to the school site had been complied with, was final on the point, as against the district, in favor of one who purchased the bonds in good faith, for value, without notice that this condition had not been complied with. The right of a *bona fide* purchaser of municipal bonds to rely upon a recital or certificate as to facts which the person making the same had authority to determine does not depend upon the bond being a negotiable instrument. It exists in the case of a *bona fide* purchaser of a non-negotiable bond as well.

CRIMINAL LAW—LARCENY OF BANK CHECK—VALUE.—In Burrows v. State, it is held by the Supreme Court of Indiana that where a larceny of a bank check is charged, the question of its value is for the jury, and it is error to instruct them that a check drawn on a bank where the maker has funds sufficient to meet it is presumptively of some value. Dailey, J., says:

It has long been an established rule of the courts that, without proof of the value of stolen property, there can be no conviction for larceny. It is essential to prove the value of the property alleged to have been stolen, in order to determine the grade of the offense, and the penalty to be imposed. In the absence of any evidence upon the subject of such value, the court or jury could not indulge in presumptions to supply the omission. The goods need not be proved to be of the value charged in the indictment, but it must be shown that they are of some value. Bick. Cr. Pr. p. 327; Moores & E. Ind. Cr. Law, p. 238, § 368, note. The market value of the article stolen, and not its original cost, is the true criterion by which to determine the grade of the larceny. Moores & E. Ind. Cr. Law, p. 239, note, citing Taylor's Case; 1 City H. Rec. 28; State v. Doepke, 68 Mo. 208; Cannon v. State, 18 Tex. App. 172; People v. Cole, 54 Mich. 238, 19 N. W. Rep. 968. There is an exception to this rule in that the value of gold and silver coin, and national currency generally, being fixed by law, no other proof of their value is necessary. McCarty v. State, 127 Ind. 223, 26 N. E. Rep. 665; Collins v. People, 39 Ill. 233; Grant v. State, 55 Ala. 201; Duval v. State, 63 Ala. 12. In all jurisdictions where the value of notes, bills of exchange, drafts, and checks is not *prima facie* fixed by statute, the question of their value is solely for the jury, and courts should not evade its province. In Iowa and Missouri, where these instruments are by statute made subjects of larceny, their value is *prima facie* fixed by statute at their face value. State v. Pierson, 59 Iowa, 271, 13 N. W. Rep. 291; 1 Rev. St. Mo. § 2539. In this State, section 1878, Burns' Rev. St. 1894 (Rev. St. 1881, § 1809), defines what written instruments may be the subject of larceny, among which are named bills, orders, drafts, checks, etc. But we have no section of the statute fixing *prima facie* the value of

such instruments. By this section such instruments are considered as personal goods, of which larceny may be committed, and their value is left to be determined by the jury, the same as that of any other article of personal property. The enactment of laws in Iowa and Missouri, fixing *prima facie* the value of these choses in action, is a controlling argument in favor of the necessity of such a law, and equally as potent a reason, in the absence of it, that the value of this class of instruments is a question alone for the consideration of the jury trying the cause. Courts cannot, during the progress of a trial, supply by instruction what they may deem to be necessary legislative enactments. The court bases its presumption of law contained in instruction No. 5 upon the contingency that the drawer of the check has on deposit as much money as will pay it, or more than enough for the purpose. It is a rule of the law, well established, that the given of a check is not payment until the money is received on it or the check is accepted by the bank at which it is made payable. People v. Baker, 20 Wend. 600, on page 604; People v. Howell, 4 Johns. 296, on page 303; Pearce v. Davis, 1 Moody & R. 365. In Harrison v. Wright, 100 Ind. 515, it was held that the execution of a check is not even an quitable assignment of any part of the funds of the maker to the payee. This being true, the fact that he maker of the check has funds in the bank could ot give rise to any presumption affecting its validity. It seems clear upon principle and by the great weight of authority, that at any time before acceptance and payment the drawer may countermand the check. In the present case, the bank at which the check was made payable being located in the State of New York, the maker could have availed himself of the right to order the bank not to pay it, or withdraw the money on deposit before it could have been presented for payment. In our opinion, in the giving of instruction number five the court usurped the functions of the jury and took away from them the question of value, which it was their province alone to determine. In criminal cases, the jury are the exclusive judges of the facts proven and of all inferences to be drawn therefrom. Moore v. State, 85 Ind. 90; Jackman v. State, 71 Ind. 149; Faller v. Salmons, 87 Ind. 328; Insurance Co. v. Buchanon, 100 Ind. 63. This is a constitutional provision, guarantied in the bill of rights. Section 64, Burns' Rev. St. 1894, declares that, "in all criminal cases whatever, the jury shall have the right to determine the law and the facts." It may be remarked that the giving of an erroneous instruction is not cured by the giving of a correct or conflicting one. In Elliott, App. Proc. § 705, it is said: "The general rule is that the court may cure errors in its instructions by withdrawing, explaining, or correcting them. Where a material instruction is given that is erroneous, it should be effectively withdrawn. An error in giving an erroneous instruction is not cured by merely giving another contradicting it. The court cannot, without fatal error, give contradictory instructions to the jury." In the case at bar it is a conceded fact that the check in controversy was mailed by the maker at his home in New York, addressed to the payee at Crawfordsville, Ind., payable to order, without any indorsement thereon. There is no testimony that it ever reached its destination, unless the posting of a letter, duly addressed and stamped, creates a *prima facie* presumption of its receipt by the party addressed within the usual time. As against such presumption, there is the positive testimony of th prosecuting witness that it never came into his pos ion, and that he did not indorse it. On the trial of the cause, it became a material question whether the check in controversy, payable to order, out of the possession of the payee, and without his indorsement thereon, was of any value. The instruction in review in effect told the jury to ignore the testimony of the witnesses as to value, for the reason already indicated,—that a value was to be presumed.

EXECUTION—EXEMPTIONS—PARTNERSHIP.—In McCrimmon v. Linton, 36 Pac. Rep. 300, the Court of Appeals of Colorado decide that under Gen. Stat. 1883, § 1866, which exempts from execution and attachment the "stock in trade, not exceeding $300 in value of any mechanic, miner or other person," a partner has no exemption as against firm creditors in the property of the firm of which he is a member. Reed, J., says:

The only question necessary to be determined, for the solution of this case, is whether the individual members of a mercantile partnership each have and hold the statutory amount, in value and interest, in the joint partnership undivided stock, exempt from execution for partnership debts. There is no such thing as joint or copartnership exemption to a trading firm. The statutory right to exemption is a personal and individual right, that may be asserted or waived by the individual, and must of necessity be exercised in relation to individual property, and, for obvious reasons, cannot be exercised in regard to joint or common property of the partnership. While the goods remain the common property of the firm, no partner has an exclusive right to any of them. "The interest of each partner n ne partnership property is his share in the surplus after the partnership accounts are settled, and all just claims satisfied." 3 Kent, Comm. 37; 2 Story, Eq. Jur. § 1263. In 2 Bates, Partn. § 1131, the law is stated as follows: "On execution against the partnership property on judgment for partnership debt, no exemption or homestead is allowed, either to the partnership as a body, or to the individual members thereof, out of the joint assets. The partnership, as a body, cannot claim it, because the homestead and exemption statutes apply to several, and not to joint, claims, and the partnership is neither an entity, an individual, nor the head of a family. An individual partner cannot claim it, because no partner has a proprietorship in any specific chattel, his interest being a share in the surplus after payments of debts and copartners' claims. Each asset belongs as much to the other partners as to him, and each partner has a lien upon it for its application to discharging debts and his own claim, when ascertained. Hence a claim of exemption, if allowed, by a partner would change the ownership. If, however, all the copartners assented, yet, to make the exemption good, their assent must be deemed to be an assignment to him of the property selected, in order that his selection might be made out of his own property; and thus his exemption is obtained, not by virtue of a statutory right, but by contract with the copartners. The right to exemption depends upon the power of selection, and this can only be exercised in property of which the debtor is the owner. If the partners are numerous, the difficulties of ascertaining if all had consented would be sometimes insuperable." In a note to the above section, in support of the proposition that there can be no exemption in partnership

property, fully a hundred cases in the federal, and courts of different States, are collected.

Another, and very cogent, reason is given in many of the decisions: That the partnership assets are a trust fund for the payment of joint creditors, and in case of insolvency the partners cannot, by mutual agreement, convert the joint property into separate property, as it would be a fraud upon the creditors. The wording of the statute is such as to preclude the presumption that it was intended to apply to goods owned jointly by a partnership. It is in the singular, in each instance: First. "The following property when owned by any person being the head of a family." "Second. The tools . . . not exceeding three hundred dollars in value of any mechanic, miner or other person, not being the head of a family." The single proposition or statement in regard to the ownership of partnership goods seems conclusive of the whole controversy. In West v. Skip, 1 Ves. Sr. 244, Lord Hardwicke said, speaking of the interest of the individual in partnership assets: "Nothing is to be considered his share, but the proportion of the residue on the balance of the account." Again: "Partners are joint tenants in the stock, and all effects. They are seized *per my et per tout.*" Consequently, if exemption attached, it must be to the partnership as a unit. No member can have, as an individual, severable, specific property in the common stock, that can be set aside to him. The claim is, and so is the statute, of setting apart specific goods to answer the demand of the individual. In T. Pars. Partn. (2d Ed.) p. 363, it is said: "What, then, is the right or interest or property of a partner to or in the effects of the partnership? Certainly, not a separate and exclusive right to any part or portion of it, or any right of any kind to any one part rather than to any other part, or any other right or interest than that which all the other partners have. It follows, therefore, that he can have no right or interest which is such, in kind or in degree, as prevents any or all of his copartners from having precisely the same; and the right which he has is the same as theirs, in reference to the whole and every part of the property." This principle in regard to the character of the ownership has been long established, and never questioned. In support of the proposition that there can be neither partnership nor individual exemption in partnership goods, of the hundreds of cases, but few need be cited. The general principles stated should be sufficient. But see Thomp. Homest. & Ex. § 197 *et seq.*; Lovejoy v. Bowers, 11 N. H. 404; State v. Emmons, 99 Ind. 452; *Ex parte* Hopkins, 104 Ind. 157, 2 N. E. Rep. 587; Gaylord v. Imhoff, 26 Ohio St. 317; Staats v. Bristow, 73 N. Y. 265; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. Rep. 347; Fingerhuth v. Lackmann, 37 Ill. App. 489; Wills v. Downs, 38 Ill. App. 269. To hold otherwise would be the confirmation, by the court, of frauds perpetrated by the individual partners. Take, for example, a case where five irresponsible parties, all without capital, form a commercial partnership, and, as soon as such obtains $1,500 worth of goods upon credit, each takes his $300 exemption, taking the entire stock. Each would have that amount that he never earned, or in any way acquired, except by fraud upon creditors. Take another illustration, founded upon the well-established principle that each individual member of a firm is answerable *in solido*, to the whole amount of the debts, without reference to the proportion of his interest, or the nature of the contract between him and his associates: Five persons form a trading corporation, obtain credit, and secure goods to the value of $1,500. One of the five is financially responsible; the other four, not. The four take, by exemption, the entire stock, and leave the fifth to pay for it.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE—CONSOLIDATION OF CORPORATIONS.—The Supreme Court of the United States decides in Ashley v. Ryan, 14 S. C. Rep. 865, that the exaction, on a consolidation of an Ohio corporation with corporations of other States, of the fees required by Rev. St. Ohio § 148*a* to be a collected on filing articles of agreement of consolidation of corporations, proportioned to the capital stock of the new corporation, constitutes no tax on interstate commerce or the right to carry on the same or the instruments thereof and involves no attempt on the part of the State to extend its taxing power beyond its territorial limits; the charge being a condition imposed by the State on the grant of privileges dependent solely on its will and the liability therefor being entirely optional. Mr. Justice White says:

That the right to be a State corporation depends solely upon the grace of the State, and is not a right inherent in the parties, is settled. Thus, in California v. Central Pac. Ry. Co., 127 U. S. 40, 8 Sup. Ct. Rep. 1073, speaking through Mr. Justice Bradley, the court said: "A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. . . . Under our system, their existence and disposal are under control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. . . . No private person can take another's property, even for public use, without such authority, which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

In Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. Rep. 593, through Mr. Justice Field, we said: "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporation, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability. The granting of such right or privilege rests entirely within the discretion of the State."

These citations only reiterate principles established beyond controversy by a series of decisions. Bank v. Earle, 13 Pet. 519; Insurance Co. v. French, 18 How. 404; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410.

Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another State. The power

of corporations of other States to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that State as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. Bank v. Earle, *supra;* Insurance Co. v. French, *supra;* Paul v. Virginia, 8 Wall. 168, 181.

In the latter case, speaking through Mr. Justice Field, we observed: "Now, a grant of a corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank v. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even, by other States, and the enforcements of its contracts made therein, depend purely upon the comity of these States,—a comity which is never extended where the existence of the corporation, or the exercise of its powers, are prejudicial to their interests or repugnant to their policy. * * * At the present day, corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued, requiring the expenditure of large capital or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would in fact be controlled by corporations created by other States."

It follows from these principles that a State, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. In Paul v. Virginia, *supra*, the court said: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."

In the case of Railroad Co. v. Maryland, 21 Wall. 456, considering a grant by the State of Maryland to a railroad company of a right to build a branch from Baltimore to Washington upon condition that the company should pay semi-annually to the State one-fifth of the amount received from the transportation of passengers over the road authorized, the court spoke as follows: "The State could have built the road itself, and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ in a constitutional point of view, when it authorized its private citizens to build the road, and reserved for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger money, and the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It was simply the exercise by the State of absolute control over its own property and prerogatives." And the contention that the charge imposed a burden upon interstate commerce was thus answered: "It may incidentally affect transportation, it is true, but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a *bonus* for the grant of a franchise payable in advance or *in futuro*, and yet that *bonus* will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a *bonus*."

In Ducat v. Chicago, *supra*, the court said: "The only difference between the statute of Virginia and that of Illinois is that the latter is more onerous to the companies than the former. The difference is in degree, not in principle." That was a case in which an insurance company was not only required to comply with the general law of the State of Illinois, but also to pay a portion of its premium to the city of Chicago as a condition of doing business therein.

The case of Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108, involved the validity of a tax imposed by the State of New York on an insurance company which had been incorporated in Pennsylvania. Mr. Justice Blatchford, in delivering the opinion of the court, said: "This Pennsylvania corporation came into the State of New York to do business, by the consent of the State, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State, for any given year, under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State, or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

Indeed, the cases illustrating this doctrine are too numerous for review, and need only be referred to. Society v. Coite, 6 Wall. 594; Provident Inst. v. Massachusetts, *Id.* 611; Hamilton & Co. v. Massachusetts, *Id.* 632; State Tax on Railway Gross Receipts, 15 Wall. 284; Railroad Co. v. Peniston, 18 Wall. 5; Delaware Railroad Tax Case, *Id.* 206; State Railroad Tax Case, 92 U. S. 575; Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118; California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073; Home Ins. Co. v. New York, 134 U. S. 594, 10

Sup. Ct. Rep. 593; Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163.

The question here is not the power of the State of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the State to determine upon what conditions its laws as to the consolidation of corporations may be availed of.

DECEIT—SALE OF BONDS—FALSE REPRESENTATIONS OF VALUE.—In Handy v. Waldron, it was decided by the Supreme Court of Rhode Island, that a false and fraudulent warranty of bonds may become actionable, although it relates to values where the buyer has no knowledge or no present facility for learning the real value; that a false statement that corporate stock has paid a certain rate of dividend, is a positive statement of a material fact, on which a buyer may rely. The rule of *caveat emptor* does not apply. Although several false representations in a sale are averred in one count, only one cause of action is alleged. Tillinghast, J., says:

In support of the demurrer, defendant's counsel contend that, as between a vendor and a vendee, representations as to the value of the thing sold, although false, and fraudulently made, with intent to deceive the vendee, are not actionable; that such representations are held to be expressions of opinion, merely,—"dealers talk,"—upon which the vendee is not entitled to rely. There can be no doubt as to the correctness of the proposition that mere expressions of belief or opinion on the part of a vendor as to the value of articles sold by him, even though false and fraudulent, cannot be made the basis of an action for deceit. This principle is ordinarily expressed in the old maxim, "*Simplex commendatio non obligat.*" It is based upon the universal practice of the seller to recommend the article or thing offered for sale, and to employ more or less extravagant language in connection therewith. As said by Benjamin on Sales (volume 1, § 508):

"The buyer is always anxious to buy as cheaply as he can and is sufficiently prone to find imaginary fault in order to get a good bargain; and the vendor is equally at liberty to praise his merchandise, in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have an opportunity of inspection, and no means are used for hiding the defects."

And the common experience of mankind is that an ordinarily prudent buyer will not rely upon such statements to his hurt. The law therefore recognizes the fact that men will naturally overstate the value and qualities of the article which they have to sell, and that a buyer has no right to rely thereon. Kimball v. Bangs, 144 Mass. 323, 11 N. E. Rep. 113. Indeed, the decisions have gone so far, under this principle, as to hold that, as said by Holmes, J., in Deming v. Darling, 148 Mass. 504, 20 N. E. Rep. 107:

"The law does not exact good faith from a seller, in those vague commendations of his wares which manifestly are open to differences of opinion, which do not imply untrue assertions concerning matters of direct observation (Teague v. Irwin, 127 Mass. 217), and as to which it has always been understood, the world over, that such statements are to be distrusted."

But while the law thus countenances a certain degree of misrepresentation, sometimes termed "privileged fraud," in commercial transactions, yet it holds the seller responsible if he falsely represents a particular fact (other than the price he paid, or an offer to him) affecting the value, quality, or condition of the property in question. Grinnell, Deceit, § 28, and cases cited. If there is an express warranty as to quality or value, the thing sold not being open to the inspection of the buyer, or if any trick or device is employed by the seller to prevent such inspection, and the buyer relies upon the warranty or false representations of the seller, and is injured thereby, the the latter may be held liable. But, in the absence of either fraud or warranty, the general rule is that the vendor is not liable for any allegations as to the quality or value of the thing sold. See Bicknall v. Waterman, 5 R. I. 43; Gordon v. Parmelee, 2 Allen, 214; Mooney v. Miller, 102 Mass. 217; Cooper v. Lovering, 106 Mass. 77; Bishop v. Small, 63 Me. 12; Brown v. Leach, 107 Mass. 367; 8 Am. & Eng. Enc. Law, p. 809, and cases cited in notes 7 and 8. See, also, Story, Sales (2d Ed.) §§ 360, 361; Nash v. Trust Co., 159 Mass. 437, 34 N. E. Rep. 625; Chandelor v. Lopus, 1 Smith, Lead. Cas. 294, and note on pages 320, 321.

The law applicable to a warranty of value is well stated by Campbell, J., in Picard v. McCormack, 11 Mich. 73. He says:

"It is undoubtedly true that value is usually a mere matter of opinion, and that a purchaser must expect that a vendor will seek to enhance his wares, and must disregard his statement of their value. But while this is generally the case, yet we are aware of no rule which determines arbitrarily that any class of fraudulent misrepresentations can be exempted from the consequences attached to others. Where a purchaser, without negligence, has been induced, by the arts of a cheating seller, to rely upon material statements which are knowingly false, and is thereby damnified, it can make no difference in what respect he has been deceived, if the deceit was material, and was relied on. It is only because statements of value can rarely be supposed to have induced a purchaser without negligence, that the authorities have laid down the principle that they cannot usually avoid a bargain. But value may frequently be made by the parties themselves, the principal element in a contract; and there are many cases where articles possess a standard commercial value, in which it is a chief criterion of quality among those who are not experts. . . . We think it cannot be laid down, as a matter of law, that value is never a material fact."

See, also, McClellan v. Scott, 24 Wis. 81; Griffin v. Farrier, 32 Minn. 474, 21 N. W. Rep. 553; Cruess v. Fessler, 39 Cal. 336; Chrysler v. Canaday, 90 N. Y. 272; Eaton v. Winnie, 20 Mich. 165, 166. In the case at bar the plaintiff alleges in the first two counts of his declaration, that the defendant warranted the bonds in question to be of the values therein named, respectively, when in fact they were not of that value, as the defendant well knew; in short, that the defendant made a false warranty as to the value of said bonds, and the plaintiff relied thereon, to his hurt. We think that when a vendor goes to the extent of warranting the value of the article sold, the vendee ordinarily has the right to rely thereon, without making further investigation, and, if the warranty proves false, to hold the vendor liable; for to warrant the value of an article is not a mere expression of opinion, but of fact. It is an express undertaking that the article is of the value placed upon it.

"A warranty is a statement of fact as to an article sold, coupled with an agreement to make the statement good."

And we see no good reason for not holding the vendor liable on his warranty as to the value, as well as on his warranty as to the quality of the article sold, and more particularly where the plaintiff, as in this case, was wholly ignorant of the premises and believed and relied on the promises and representations of the defendant as to the value of the bonds. Had the defendant, by words or acts, deceived the plaintiff as to the quality or value of goods sold, which were open to his observation and inspection, so that, by ordinary diligence, he could have ascertained their value, no action could be maintained. But such was not the case here. The defendant knew the value of the bonds, but the plaintiff did not, and so far as appears, had no ready means of ascertaining the same. He trusted to the honesty of the defendant as to the value of the bonds, and was by him deceived and cheated. To uphold such a transaction would be to connive at dishonesty and fraud, and bring the administration of law into just contempt.

CONDITIONAL SALE — VALIDITY.—The Supreme Court of Utah in Hirsch v. Steele, hold that a conditional sale of merchandise, to be resold by the vendee, is valid as against his attaching creditors. Smith, J., says:

The only question presented by the record is whether the conditional sale of merchandise under the above contract for resale by the vendee is valid. The doctrine that conditional sales of specific chattels, sold to be held and used by the vendee, are valid, has been long established in England, and, in the absence of statutes to the contrary, generally prevails in all the States of the Union, except Illinois, Kentucky, Virginia, and perhaps one or two others. It is fully settled in Utah. See Russell v. Harkness, 7 Pac. Rep. 865: Shoshonetz v. Campbell, 24 Pac. Rep. 672. And in the case of Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, the Supreme Court of the United States has given the great weight of its authority to this doctrine. We do not understand that appellant questions this rule, as applied to specific chattels sold for use by the vendee, but claims that a distinction should be made where, as in this case, goods are sold to a vendee for resale by him. As was said by the Supreme Court of New Mexico in the case of Redewill v. Gillen, 12 Pac. Rep. 877: "This position appeals strongly to our sense of justice, and we should hold with him, and thus uproot, in this jurisdiction, what we consider a pernicious system of secret titles, concealed in the pockets of the owner, and calculated to entrap the unwary, were we not impelled by an overwhelming weight of authority to the contrary." The States of New York and Indiana alone make the distinction insisted upon by appellant. See Ludden v. Hazen, 31 Barb. 650, and Bonesteel v. Flack, 41 Barb. 440. And for the rule in Indiana see Manufacturing Co. v. Carman, 9 N. E. Rep. 707. Kansas occupies a doubtful position on the question. In support of appellant's contention may be cited Poorman v. Witman, 31 Pac. Rep. 370. But the case of Standard Implement Co. v. Parlin & Orendorff Co., 33 Pac. Rep. 360, is by the same court, and on the other side of the question. But the following cases of the same character as the one at bar are directly in point, and against the appellant, to-wit: Lewis v. McCabe, 49 Conn. 141 (which was a conditional sale of liquors to a retail merchant). Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. Rep. 379 (a case of the same kind); Armington v. Houston, 38 Vt. 448 (a case where provisions were sold to be consumed by the family of the vendee); Rogers v. Whitehouse, 71 Me. 222 (a case of groceries sold conditionally to a retail merchant for resale); Burbank v. Crooker, 7 Gray, 158 (a case exactly like the last). Without further citation, we will say that the authorities, up to a very recent date, are all collated in Bennett's Notes to Benjamin on Sales (pages 271-277 of the first American edition), and it only requires a very slight examination to see how overwhelmingly the weight of authority is against the appellant. However much we may desire to see this rule abolished in this territory, we believe that it is the duty of the legislature, and not of the courts, to abolish it. Judicial legislation is to be avoided, although the enforcement of the law, as we find it, may work a hardship in individual cases.

EVIDENCE — LIKE EFFECTS FROM SAME CAUSE.

Frequently at the time of the injury in question, or before or after the happening of the same, others, by reason of the same defect, have either been injured or affected by it. This gives rise to the question whether the effect upon others of the defect in controversy is admissible in evidence. Upon this our courts have succeeded in widely disagreeing. This disagreement gives rise to two lines of decisions, the one holding such testimony admissible either in proof of the dangerous character of the cause or in proof of knowledge of its existence. By the other such testimony is not only held inadmissible for any purpose whatever, but absolutely incompetent as raising collateral issues. A review of the cases upon this subject, with sufficient to indicate the nature of each, how decided and the reasons therefor, together with conditions governing admission of such testimony, may be of practical use to the practitioner. For convenience of reference, not that different principles are involved, classification of these cases may be of service.

1. *Injuries Caused by Fright of Horses.*—In this class of cases, sufficiently large to warrant separate mention, it is competent to show that other horses were frightened by sound of a locomotive whistle;[1] by noise of steam escaping from a locomotive, as tending to show that it was likely to frighten horses;[2] by steam escaping from a mill;[3] by a pile of lumber, as tending to show whether it was such an object as was liable to produce

[1] Hill v. The Portland, etc. R. Co., 55 Me. 438.
[2] Gordon v. The Boston, etc. R. Co., 58 N. H. 396.
[3] Crocker v. McGregor, 76 Me. 282.

fright;[4] by a hole in a bridge, constituting part of the highway, as tending to show its continued existence, dangerous character and tendency to frighten horses;[5] by a mill wheel, as tending to show it was such an object as would naturally frighten horses;[6] by a flag, similar to the one in question, suspended over the same street in a similar manner;[7] by a pile of stones, at the side of the road, as tending to show that it presented an unusual and strange appearance;[8] but, on the contrary, it is held inadmissible for defendant to show that numerous horses had been driven past a mortar-box, lying near the track, with- would open the door to numerous side issues. out becoming frightened.[9]

2. *Injuries Caused by Defective Sidewalks.*—For the purpose of proving defective condition of the sidewalk, at the time of the injuries in question, it is competent to show that others had slipped and fallen upon it, as tending to show that, tested by actual use, it was in an unsafe and improper condition;[10] or had fallen over a water-gate projecting from it;[11] or had tumbled down upon it;[12] or that similar accidents had occurred at the same place, as tending to establish its condition and knowledge of the same by defendant;[13] or that others had fallen into a cellar-way constructed in it;[14] or that others had slipped upon it, as tending to establish a physical fact;[15] and, as tending to show that the sidewalk was not dangerous, it is competent to show that others passed over it without injury.[16] But, in opposition to the foregoing, it is held incompetent to show that others had slipped and fallen upon it;[17] neither, in proof that the sidewalk was not defective, is it competent to be shown that others passed over it in safety.[18]

3. *Injuries Caused by Defective Roadways.*—For the purpose of proving defective condition of the roadway, at time of the injuries in question, it is competent to show the effect of the road upon other carriages, as tending to show by actual experiment, its fitness or unfitness for public travel;[19] that others, by reason of the absence of barriers, had fallen into a canal, as tending to show notice by defendant;[20] how other teams were affected in passing over a log, as tending to show condition of the road by actual experiment;[21] that other accidents occurred, as tending to show bad nature of the roads or want of familiarity with them;[22] that other teams had run into a post, as tending directly to show its dangerous character and negligence of defendant;[23] that others had fallen into the water by reason of a swing bridge, constituting part of the highway, being out of place;[24] that a too high railway switch, located in the street, caused accidents to others.[25] But, in opposition to the foregoing, it is held incompetent to show that another person drove against the post;[26] or fell over the embankment in attempting to avoid a hole in the highway;[27] or that others were upset by a defect in the road;[28] or that accidents happened to others in crossing the horse railroad track by reason of the too high rails;[29] or that another horse had its foot caught between the plank and rail in crossing the railroad track;[30] or that others were upset by embankments or breaks made across the road;[31] and admissibility of proof of other accidents, held, questionable;[32] and, as tending to show that the road was not dangerous, it is not competent to show that others passed over it without injury;[33] and, on the sufficiency of the width of the highway, it is inadmissible to show that ve-

[4] Darling v. Westmoreland, 52 N. H. 401.
[5] Smith v. Township of Sherwood, 62 Mich. 159.
[6] House v. Metcalf, 27 Conn. 631.
[7] Champlin v. Penn Yan, 34 Hun, 33.
[8] Eggleston v. Columbia Turnpike Road, 18 Hun, 146.
[9] Bloor v. Town of Delafield, 69 Wis. 273.
[10] Quinlan v. City of Utica, 11 Hun, 217.
[11] Burns v. City of Schenectady, 24 Hun, 10.
[12] Avery v. City of Syracuse, 29 Hun, 537; District of Columbia v. Arms, 107 U. S. 519.
[13] City of Topeka v. Sherwood, 39 Kas. 690.
[14] City of Augusta v. Hafers, 61 Ga. 48.
[15] City of Aurora v. Brown, 12 Bradwell, 122.
[16] Calkins v. City of Hartford, 33 Conn. 57.
[17] Hubbard v. City of Concord, 35 N. H. 52.
[18] Bauer v. City of Indianapolis, 99 Ind. 56; Temperance Hall Ass'n of Trenton v. Giles, 33 N. J. L. 260.
[19] Kent v. Town of Lincoln, 32 Vt. 591.
[20] City of Delphi v. Lowery, 74 Ind. 520.
[21] Walker v. Westfield, 39 Vt. 246.
[22] Higley v. Gilmer, 3 Mont. 90.
[23] Phelps v. City of Mankato, 23 Minn. 276.
[24] City of Chicago v. Powers, 42 Ill. 169.
[25] Wooloy v. The Grand Street, etc. R. Co., 83 N. Y. 121.
[26] Collins v. Inhabitants of Dorchester, 6 Cush. 349.
[27] Blair v. Inhabitants of Pelham, 118 Mass. 420.
[28] Hubbard v. And., etc. R. Co., 39 Me. 506.
[29] Jacques v. Bridgport, etc. R. Co., 41 Conn. 61.
[30] Hudson v. C. & N. W. R. Co., 59 Iowa, 581.
[31] Sherman v. Kortright, 52 Barb. 267.
[32] Bailey v. Town of Trumbull, 31 Conn. 581.
[33] Schoonmaker v. Inhabitants of Wilbraham, 110 Mass. 134; Kidder v. Inhabitants of Dunstable, 11 Gray, 342; Branch v. Libbey, 78 Me. 321.

hicles passed other vehicles thereon without collision.[34]

4. *Injuries Resulting from Various Causes.*—For the purpose of proving defective condition, it is competent to show injury to another by the same turn-table, as tending to show knowledge by defendant of its condition;[35] or that, by reason of the back track, other engines had left the track, as tending to show its condition;[36] or that, by reason of the same low joint, other cars had run off the track;[37] or that smoke was emitted from the mill chimney, as tending to show its habits;[38] or that the chimney had at other times emitted smoke, sparks and flame, as tending to show improper construction;[39] or an attempt on the same night to fire another building by the same means, as tending to show incendiary origin;[40] but that other meadows were injured by overflow is incompetent, unless similar to those in question;[41] and, as tending to prove that the alleged dangerous cause was not dangerous, it is competent to show frequent daily use for years of the approach to the grain elevator without occurrence of similar accidents;[42] or that other boats, similarily constructed, had run for years without any similar accident.[43] But, in opposition to the foregoing, it is held incompetent to prove that others had fallen into the same turn-table;[44] or, as tending to show that a hall and passage, leading to an elevator-way, was not sufficiently lighted, that others had met with similar accidents;[45] or that others had fallen in a passage-way, when in like darkened condition;[46] or that others had walked off the boat into the river, by reason of insufficient light, and absence of chain across its bow;[47] and, on application for an injunction to prevent mining operations, on the ground of threatened injury to plaintiff's land, evidence that other lands, under similar circumstances, were injured is incompetent.[48]

4. *Principles Governing the Admission of this Testimony.*—The grounds for the admission of this character of testimony are often omitted in the above notation of cases, and this for the reason that the decisions themselves fail to state the same. But, evidently, in these cases, in approval of the reasons in many other cases expressly stated, such testimony is deemed competent as tending to prove the dangerous character of the cause or knowledge of its existence. The time to which such testimony has been directed appears to in nowise have entered as a factor into the question of its admissibility; and that testimony as to the effects of the alleged dangerous cause both prior and subsequent to the happening of the injury in question is to the same extent competent as though directed to the actual time of the injuries in question, may be safely asserted. To render such testimony competent, however, it should appear that the conditions, at the time to which it refers, were the same, or similar, as at time of the injury in question.[49] Upon this point the Supreme Court of Minnesota evidently sets forth the correct rule in the following language, "that it must appear, or at least the evidence must reasonably tend to show, that the instrument or agency whose condition is in issue was in substantially the same condition at such times as it was when the accident complained of occurred."[50] The grounds for rejection of this character of testimony are wholly omitted in the above notation of cases, for the reason that many of the decisions themselves fail to state the same, but the only assigned reason for its rejection is that it raises collateral issues,[51] but on the

[34] Aldrich v. Inhabitants of Pelham, 1 Gray, 510.
[35] The G. C. & S. F. R. Co. v. Evansich, 63 Tex. 54.
[36] Morse v. Minneapolis, etc. R. Co., 30 Minn. 465; Clapp v. Minneapolis, etc. R. Co., 36 Minn. 6.
[37] Mobile, etc. R. Co. v. Ashcroft, 48 Ala. 15.
[38] Hoyt v. Jeffers, 30 Mich. 181.
[39] Gagg v. Vetter, 41 Ind. 228.
[40] Faucett v. Nichols, 64 N. Y. 377.
[41] Standish v. Washburn, 21 Pick. 237.
[42] Field v. Davis, 27 Kas. 400.
[43] Dougan v. Champlain Transportation Co., 56 N. Y. 1.
[44] Early v. Lake Shore, etc. R. Co., 66 Mich. 349.
[45] Parker v. Portland Publishing Co., 69 Me. 173.
[46] Martinez v. Planel, 36 Cal. 578.
[47] Davis v. The Oregon, etc. R. Co., 8 Oregon, 172.
[48] Clark v. Willett, 35 Cal. 534.
[49] Crocker v. McGregor, 76 Me. 282; City of Topeka, v. Sherwood, 39 Kas. 690; District of Columbia v. Arms, 107 U. S. 519; Quinlan v. City of Utica, 11 Hun, 217; City of Aurora v. Brown, 12 Bradwell, 122; Calkins v. City of Hartford, 33 Conn. 57; City of Chicago v. Powers, 42 Ill. 169; Standish v. Washburn, 21 Pick. 237; Morse v. Minneapolis, etc. R. Co., 30 Minn. 472; Clapp v. Minneapolis, etc. R. Co., 36 Minn. 6; Bloor v. Town of Delafield, 69 Wis. 273.
[50] Morse v. Minneapolis, etc. R. Co., 30 Minn. 472.
[51] Collins v. Inhabitants of Dorchester, 6 Cush. 394; Blair v. Inhabitants of Pelham, 118 Mass. 420; Aldrich v. Inhabitants of Pelham, 1 Gray, 510; Bauer v. City of Indianapolis, 99 Ind. 56; Temperance Hall Ass'n of Trenton v. Giles, 33 N. J. L. 260; Hubbard v. And., etc. R. Co., 39 Me. 506; Jacques v. Bridgport, etc. R. Co., 41 Conn. 61; Parker v. Portland Publishing Co., 69 Me. 173; Martinez v. Planel, 36 Cal. 578;

other hand, it is expressly held that such testimony does not raise collateral issues.[52] Upon this point the Supreme Court of Kansas, following in substance the language of Quinlan v. City of Utica,[53] says: "In a limited sense every item of evidence material to the main issue presents a new issue in this respect, at least; it invites, by way of reply, a contradiction or an explanation. In no other way did the evidence make a new issue. It was important to show that the sidewalk was unsafe and dangerous, and upon that question the defendant was required to be prepared."[54] Under the decisions herein referred to, weight of authority evidently favors admission of this class of testimony. In further support of the same, and often so cited in the decisions herein, may also be included a large class of cases resulting from fires caused by locomotive engines;[55] but as this class of cases has to considerable extent already been discussed in the pages of this journal,[56] and as the considerations incident thereto lead to too great length, the same are here omitted.

In conclusion it may be proper to add, as may have already been observed, that decisions of the same court are not all in harmony with each other, and that the courts of Maine, New Hampshire, Michigan, Connecticut, New York, Indiana, and Massachusetts have decided both for and against the admission of this class of testimony.

E. F. HILTON.

Topeka, Kansas.

Clark v. Willett, 35 Cal. 534; Sherman v. Kortright, 52 Barb. 267; Hubbard v. City of Concord, 35 N. H. 52; Bloor v. Town of Delafield, 69 Wis. 273.

[52] City of Topeka v. Sherwood, 39 Kas. 690; Walker v. Westfield, 39 Vt. 246; Calkins v. City of Hartford, 33 Conn. 57; Morse v. Minneapolis, etc. R. Co., 30 Minn. 465; Quinlan v. City of Utica, 11 Hun, 219.

[53] 11 Hun, 219.

[54] City of Topeka v. Sherwood, 39 Kas. 690.

[55] Shearman & Redfield on Negligence, Sec. 675; Pierce on Railroads, 439, 440; Thompson on Negligence, 158 *et seq.*; Rice on Evidence, 509; Am. & Eng. Enc. of Law, Vol. 8, p. 9, note.

[56] Vol. 2, p. 642, note.

NOTE.—See also following cases, on fright of horses, Pollett v. Simmers, 106 Pa. St. 95; Cleveland, etc. R. Co. v. Wynant, 114 Ind. 525; on defective roadways, Phelps v. Winona, etc. R. Co., 37 Minn. 485; Merrill v. Inhabitants of Bradford, 110 Mass. 505; and various causes, City of Ft. Wayne v. Coombs, 107 Ind. 75; Louisville, etc. R. Co. v. Wright, 115 Ind. 378; Johnson v. Manhattan R. Co., 52 Hun, 111; Hodges v. Bearse, 129 Ill. 87.

USURY—NOTES—INNOCENT PURCHASER.

WARD V. SUGG.

Supreme Court of North Carolina, December 19, 1893.

A note given wholly for usurious interest is void, even in the hands of an innocent purchaser, under Code, § 3836, declaring the taking or charging of usurious interest, when knowingly done, to be a forfeiture of the entire interest. Burwell, J., dissenting.

CLARK, J.: The jury found that the $400 note in suit was wholly given for a usurious charge for the use of money, and that the present holder acquired it before maturity, for value and without notice. The question whether it is valid in his hands is not an open one in this State. Such note is held to be void, into whatever hands it may pass. Ruffin v. Armstrong, 9 N. C. 411; Collier v. Nevill, 14 N. C. 30. Such was also the law in England until the law was in some respects modified by the act of 58 Geo. III., and is the law in New York and other States, except where modified by statute. Rand. Com. Paper, § 525; 3 Pars. Cont. (5th Ed.) 117; Powell v. Waters, 8 Cow. 669; Wilkie v. Roosevelt, 3 Johns. Cas. 206; Solomons v. Jones, 5 Amer. Dec. 538; Oneida Bank v. Ontario Bank, 21 N. Y. 495, cited by Smith, C. J., in Rountree v. Brinson, 98 N. C. 107, 3 S. E. Rep. 747; Callanan v. Shaw, 24 Iowa, 441. When the statute makes a note void, it is void into whosesoever hands it may come, but, when the statute merely declares it illegal, the note is good in the hands of an innocent holder. Glenn v. Bank, 70 N. C. 191, 206. Hence, it was argued strenuously that the authorities above cited were good under our former statute, which made the contract void, but that the present statute merely makes the contract illegal. It does not so seem to us. The former statute (Rev. Code, ch. 114; Rev. St. ch. 117) denounced the contract as void as to the whole debt,—principal and interest. The present statute (Code, § 3836) makes it void, not as to principal, but as to the interest only. It provides that "the taking, receiving, reserving or charging a rate of interest greater than is allowed * * * shall be deemed a forfeiture of the entire interest * * * which has been agreed to be paid," with a further provision that, if such interest has been paid, double the amount can be recovered back by the debtor. The only difference between the two acts is that formerly the whole note was forfeited and of no avail, and now only the stipulation as to the interest is *ipso facto* deemed forfeited and void. But the point has already been adjudicated by this court. In two cases this court, and by most eminent judges, has expressly held that the words "deemed a forfeiture," in the act of 1876-77 (now Code, § 3836), make void the agreement as to interest. If any attention is to be paid to the doctrine of *stare decisis*, the precedents in our own court do not leave this open to debate. In Bank v. Lineberger, 83 N. C. 454 (on page 458), Ashe J., quotes this section in full, and says: "The purpose and effect of this statute were not only to make void all agreements for usurious interest, but to give a

right of action to recover back double the amount after it has been paid." Dillard, J., in Moore v. Woodward, 83 N. C. 531 (on page 535), says: "They [the notes there sued on] are both wholly for illegal interest, if the allegations of the answer be true, and, if so, then the sentence of the law is that they are void;" and further says: "The device of taking a distinct bond and mortgage for the interest does not take the case out of the operation of the statute." The opinions of such judges upon a court constituted as the bench then was are surely entitled to be considered the law in this State until changed by legislation. And in Glenn v. Bank, 70 N. C. 191 (bottom of page 205), Rodman, J., says that "it is admitted law" that "notes vitiated by a usurious or gaming consideration cannot be enforced in the most innocent hands, but are always, and under all circumstances, void." Our own decisions upon our own statute should govern, even though a court of another jurisdiction, upon a somewhat similar statute, had ruled differently. But in fact the case relied on to that effect (Oates v. Bank, 100 U. S. 239), merely holds that the contract, being not void *in tota*, but only as to the interest "being legal in part and vicious in part, the former will support a contract of indorsement." But here the note is solely for usury, and, being wholly vicious, this authority is against its validity in the hands of the assignee. In 1 Daniel, Neg. Inst. § 198, it is stated that where the statute provides that when, "in an action brought on a contract for payment of money, it shall appear that unlawful interest has been taken, the plaintiff shall forfeit threefold the amount of the unlawful interest, so taken, it was held to apply to the innocent indorsee of a note, who received it in due course of trade; and, as a general rule, all contracts founded on considerations which embrace an act which the law prohibits under a penalty are void;" citing Kendall v. Robertson, 12 Cush. 156; Woods v. Armstrong, 54 Ala. 150. In Kendall v. Robertson the Massachusetts law had undergone a change similar to ours, and Shaw, C. J., says: "The former law extended the entire forfeiture to any holder of the note, though an innocent indorsee. The natural conclusion is, in the absence of express words changing the operation of the law, that it was the intention of the legislation to extend such partial forfeiture in like manner, and attach it, as before, to the note, although held by an innocent indorsee without notice. In both cases the intention of the legislature appears to have been the same,—to suppress a mode of lending regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequence to the contract itself, whenever set up as a proof of a debt." And at the last term of this court (Moore v. Beaman, 112 N. C. 558, 16 S. E. Rep. 177), it is said: "The contract, usury being pleaded, is simply a loan of money which in law bore no interest." The note for the usurious interest being in the hands of an assignee, he, and not the maker, must suffer. The lwa regards the maker, not as in *pari delicto* with the payee, but as the victim of an oppression which the law has denounced and prohibits under penalty. Bank v. Lutterloh, 81 N. C. 142. If, by passing the note off before maturity and for value, the indorsee may recover on it, the statute is useless, as the protection intended, and the penalty and prohibition, are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law, which had declared the "entire interest forfeited" *ab initio*, by the fact of "charging or reserving" it. On the other hand, the innocent indorsee has his recourse upon the payee who has indorsed the note to him (1 Daniel Neg. Inst. § 807); a recourse which would more surely protect him, being against the party who has money to loan, not to borrow. At any rate, the fact that the indorsee's sole remedy as to the interest is against the payee and indorser, not against the maker, will cause such lenders to be more chargy of shouldering off upon innocent parties the collection of their usurious contracts.

The only case in our Reports that seems to mitigate against the otherwise uniform tenor of our decisions on this subject is Coor v. Spicer, 65 N. C. 401, which held that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the statute. Rev. Code, ch. 50, § 5, (now Code, § 1549.) Aside from the fact that this is held expressly otherwise in the later case of Moore v. Woodward, 83 N. C. 531, an examination of section 1549 will show that Coor v. Spicer was a palpable inadvertence. The statute cited (Code, § 1549) in fact does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property" at sale under the mortgage, who buys without notice of the usurious taint in the debt secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice, usually, to the assignee of the note. There is a broad distinction, which runs through all the cases everywhere, between contracts upon an illegal consideration as to which, the parties being in *pari delicto*, the courts will aid neither party, but will protect the note in the hands of a holder for value without notice, and a contract which, in whole or in part, is declared void or forfeited in its inception, which can acquire no validity by being passed on to other hands. Henderson v. Shannon, 1 Dev. 147; Glenn v. Bank, *supra*. As to usurious contracts, the law regards the maker, not as in *pari delicto*, but as acting "in chains" (1 Story, Eq. Jur. § 302); and to permit his contract which is deemed exacted under duress to come under the general rule in favor of innocent holders for value of commercial paper would be to nullify the protecting statute. The recourse

of the holder is against the payee and indorser who is more likely, by far, to be able to respond than the maker. The statute makes the "taking, receiving, reserving or charging usury when knowingly done," *i. e.*, intentionally done, and not by a mere error of calculation, a forfeiture (not merely forfeitable) of the entire interest which the note carries with it, "or which has been agreed to be paid thereon." The note in this case falls exactly within the evil denounced in the last clause. It is a written promise to pay the usury reserved or charged on the note, and such charging or reserving is *ipso facto* a forfeiture, which attaches either by the taking, receiving, reserving, or charging, as the law makers evidently intended to prevent and head off all casuistry, for which this class of law breakers have in all times been specially noted, and to carry out the legislative intent of *bona fide* protecting the public, not nominally, but in fact, from evasions of this law. But if, in truth, the forfeiture was limited to the "knowingly receiving," the holder of this note certainly knows now, and doubtless did before suit brought, that this note was given for usury "agreed to be paid," and his receiving it would *eo instanti* work a forfeiture. Besides, if the maker should have voluntarily paid this note, the receiver of such payment knowing it was for usury, the statute gives the person "by whom it was paid, or his legal representative," an action to recover back twice the amount. *Cui bono*, then, shall the debtor be compelled by law to pay the usurious note, when instantly he can recover back double the sum of the party to whom he pays it, as a punishment for knowingly receiving it? Such multiplicity of actions was not tolerated under the old practice, and certainly will not be under the present simpler and more practical system of procedure. Bank v. Lutterloh, 81 N. C. 142, was decided under the act of 1866, and, to cure the defect in that act, the wording of the present statute is made explicit, and gives the action to recover back. Under the act of 1866 there was no forfeiture, as now, but simply interest could not be collected. While the "charging, reserving" etc., is now a forfeiture of the contract as to all interest *ab initio*, the recovery of double the sum paid is necessarily from the party to whom it is paid, for the language is "may recover back" double the sum paid, which can only be from the party receiving the money. With the policy of the law-making power the courts have nothing to do, further than as it may throw light upon the meaning of the statute by considering the evil to be remedied. That is thus considered by Taylor, C. J., in Ruffin v. Armstrong, 9 N. C. 411, 416: "It is not less important now than it was then to restrain the power of amassing wealth without industry, and to prevent those who possess money from sitting idle and fattening on the toil of others; it is not less important to prevent those who desire profit from their money without hazard from receiving larger gain than those who employ it in undertakings attended with risk, calculated to encourage industry, and to multiply the sources of public prosperity; nor is it less important to facilitate the means of procuring money on reasonable terms, and thereby to render the lending of it more extensively beneficial." In a matter so capable of oppression as the lending of money, the legislature has deemed it wise to regulate the limit of what is a reasonable exaction for its use, since all interest is the creation of statute. Moore v. Beaman, *supra*. As to lenders upon a lawful rate of interest, the legislature has looked upon them with a favorable eye, and of late years has raised the limit from 6 to 8 per cent. But there is nothing in the action of the legislature, nor in the circumstances of the day, which indicates that this is a propitious time to relax the restrictions placed heretofore upon the illegal exactions to those who would use their money contrary to law, and yet call upon the law to aid them, directly or indirectly, to secure their unlawful gains. Error.

NOTE.—It appears from the dissenting opinion of Burwell, J., that by the terms of the statute which was in force in North Carolina before the act of 1866 all contracts founded upon usurious considerations, were declared to be void and according to all the authorities, promissory notes thus expressly avoided are void in the hands of indorsees for value without notice. By the act of 1866 the legal rate was fixed at 6 per cent., with a proviso allowing 8 per cent. to be charged for money loaned, if the contract was in writing, and signed by the party to be charged; and it was therein enacted that, if a greater than the legal rate was charged, the interest should not be recoverable. This law, as was said by Justice Dillard in Bank v. Lutterloh, 81 N. C. 144, introduced a new theory. It was an expression of the popular will. It did not declare the contract void in whole or in part. It did declare that the contract, so far as it related to interest, was not enforceable in the courts,—that it could not be collected by law,—and in effect it enacted that so much of the contract as concerned the rate of interest was void, the word "void" being used here as it is in Moore v. Woodward, 83 N. C. 531. Speaking accurately, the contract for interest in excess of the legal rate was made by that act, not void, but illegal. This act remained in force until 1875, when the legislature adopted a law which distinctly declared "void" all contracts, both as to principal and interest, if a greater than the legal rate was charged. When this statute went into effect, what are called "usurious contracts," and all notes, bonds, etc., founded on such contracts, were not only illegal, but void. In 1874 the case of Glenn v. Bank, was decided (70 N. C. 191), and Justice Rodman said, in his opinion filed in that cause: "If the statute declares a security void, it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of one claiming through such a holder. The case of Hay v. Ayling, 16 Adol. & E. (N. S.) 423, is a notable illustration of the difference. Gaming securities were declared void by 9 Anne, ch. 14, § 1, and it was held that they were void in the hands of a *bona fide*, innocent indorsee. The act of 5 & 6 Wm. IV., ch. 41, § 1, modified the act of Anne, and declared they

should be illegal. The court held that after that act they could be recovered on by an innocent holder." It is to be presumed that the act of 1874-75, enacted, as it was, one year after that, announcement of the rule of law, was framed by men acquainted with that decision, and that it was then provided that all usurious contracts should be void in order that they might be invalid in whosesoever hands they might come. In 1876-77 another change was made in the law, and the statute then enacted is in force at this time. That act nowhere, *in totidem verbis*, declares void a contract for interest in excess of the legal rate. It is to be presumed that this enactment was also framed in distinct recognition of the rule laid down by the learned justice in Glenn v. Bank, *supra*, and much significance is to be attached to the fact that, with this rule thus brought to its attention, the legislature repealed a law which declared all such contracts void, and adopted one which omitted to so declare them. And here it may be well to note the often inaccurate, or rather misleading, use of the word "void," in statutes and reports. Parker, C. J., in Somes v. Brewer, 2 Pick. 184, says, of the words, "void and voidable," that they "have not always been used with nice discrimination; indeed, in some books there is a great want of precision in the use of them;" and he adds that, for the purposes of the case he was considering, "the term 'void' will be used to express that which is in its very creation wholly without effect,—an absolute nullity." In Baucom v. Smith, 66 N. C. 538, Pearson, C. J., said of the bond there in suit that it "was void in the hands of the obligee for the illegality of consideration;" and then he adds: "Had the bond been assigned before it was due, the assignee for valuable consideration, and without notice, could have maintained an action to enforce payment. This is settled. Henderson v. Shannon, 1 Dev. 147." Numerous instances of this use of the word "void" could easily be cited from our reports. Justice Reade makes similar use of the word in Coor v. Spicer, 65 N. C. 401. What he there says there may well be quoted here: "Except as otherwise provided by statute, a negotiable instrument, void as between the original parties by reason of any illegality in the consideration, was nevertheless good in the hands of an indorsee for value and without notice."

The dissenting Judge concludes as follows: "If it be said that the effect of the provision of the act of 1876-77 is to make void all contracts entered into contrary to its provisions, it is to be replied that, in the interest of commerce and trade, *bona fide* purchasers of commercial paper are favorites of the modern law of every enlightened nation, and, at this day at least, it is not allowable to destroy, by an inference, negotiable instruments in the hands of such purchasers. The rule is, as I understand, that if the maker of a negotiable note contests the right of one who has acquired it by indorsement for value, before maturity and without notice of any defense, to recover of him the amount of the note, he must be able to show a statute that *in totidem verbis* declares the note to be void, or one that makes the contract illegal, and expressly or by necessary implication, declares that this illegality shall avoid the contract and all securities given in fulfillment of such illegal contract into whosesoever hands they may come, and thus render them unenforceable in the courts. Story, Prom. Notes, § 192; Converse v. Foster, 32 Vt. 828. In sections 807 and 808 of Daniel on Negotiable Instruments it is said that, "in many localities, negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations,—that is, void between the parties, but valid in the hands of a *bona fide* holder;" and that "where the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving *bona fide* ownership for value; . . . and in all cases where the statute does not declare the instrument void, *bona fide* ownership for value being proved, the holder is entitled to recover." The reason of this rule is well stated in Bank v. Prather, 12 Ohio St. 497, as follows: "The cardinal principle of the commercial law which protects commercial paper regular upon its face, and negotiated before its maturity, cannot be otherwise vindicated; and this is of much more importance than that one who has received the benefits of the paper should be compelled to perform an engagement which he voluntarily made." In Converse v. Foster, *supra*, the rule, as I conceive it to be, is thus expressed by Poland, J.: "The English statutes against usury and gaming not only impose a penalty for such illegal acts, but expressly declare that all notes, bills, bonds and other securities given for such illegal consideration shall be utterly void. All the cases that have been cited, and all that can be, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between the statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff, or some other party between him and the defendant, took the bill or note *bona fide*, and gave a valuable consideration for it; but unless it has been so expressly declared by the legislature, illegality of consideration will be no defense in an action at the suit of a *bona fide* holder for value, without notice of the illegality." A recognition of the principle thus well expressed may be seen, I think, in the chapters of the Revised Code that relate to usury and gaming, and in the act of 1874-75, above referred to. In Moore v. Woodward, *supra*, the learned justice who delivered the opinion says: "Under our present statute, while the contract is valid as to the principal, a stipulation for usurious interest, secured by a separate bond and mortgage therefor, ought, as between the parties at least, on plea of the illegality, to bar the direct collection of the same by an action therefor." In a former part of the opinion he had remarked that, under the provision of the Revised Code, a usurious contract was void, "in whosesoever hands it might come." His subsequent statement, quoted above, seems to indicate that he thought that contracts made in contravention of the provision of the present law, which he was discussing, were illegal, and were void as between the parties, but, being only illegal, were not void in whosesoever hands they might come; evidently having in mind the rule laid down by Justice Rodman in Glenn v. Bank, *supra*. The act of 1876-77 (Code, § 3836), which we are construing, is in all essential particulars copied from the national banking act (Rev. St. § 5198). The words are almost identical. The forfeitures and penalties are the same. The Supreme Court of the United States has held, in Oates v. Bank, 100 U. S. 239, that that act "does not declare the contract, under which the usurious interest is paid, to be void;" and it is to be noted that this language is used by that court in drawing a contrast between the act it was construing and the law of Maryland, which did declare all usurious contracts void, and therefore not enforceable, even in the hands of *bona fide* indorsees. We therefore have an adjudication of the point under discussion from the highest court. In conclusion, our statute does not expressly make void notes given for a usurious consideration. It is not a necessary inference from its provisions that the legislature intended they should be so. I think, therefore, that, though the note here in suit is founded upon an illegal consideration, it is recoverable in the hands of a *bona fide* holder for value and without notice."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY — Maritime Liens — Assign.— A claim for maritime wages is assignable, and the lien also passes by the assignment, so that the assignee is entitled to enforce such lien in his own name.—THE IDEA, U. S. D. C. (Miss.), 60 Fed. Rep. 294.

2. ADVERSE POSSESSION—Deed.—Evidence on an actual and visible possession of land under a deed inconsistent with the claims of all others supports a plea of limitation as to all the land comprehended in the deed, though only a part of it is occupied, and though the claimant does not actually reside on any of the land.—HODGES v. ROSS, Tex., 25 S. W. Rep. 975.

3. ANIMALS — Injuries — Contributory Negligence.— Under Pub. St. ch. 102, § 93, providing that the owner of a dog "shall forfeit to any person injured by it" double damages, to be recovered in an action of tort, plaintiff in such action must show that he exercised due care.—RAYMOND v. HODGSON, Mass., 36 N. E. Rep. 791.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for the benefit of creditors under the provisions of our statutes does not place the property of the assignor in custody of law.—IN RE ENDERLIN STATE BANK, N. Dak., 58 N. W. Rep. 514.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Though the possession of a note by the maker after maturity is *prima facie* evidence of payment, where the maker made an assignment before its maturity, and his exemptions were not equal to the amount of the sum, such presumption is overcome; unless it is shown that he acquired means to pay the same subsequent to the assignment; as, since by Mansf. Dig. § 1649, it is a misdemeanor to make a fraudulent assignment, the presumption of payment would be allowed to overcome the presumption of innocence and good faith.—EXCELSIOR MANUFG. CO. v. OWENS, Ark., 25 S. W. Rep. 868.

6. ATTACHMENT BY NON-RESIDENTS.—In an action on a money demand against a non-resident defendant, where an attachment warrant is issued when the summons is filed, and property of defendant situated in the county where the action is brought is attached, and summons is had against such defendant both by publication under order obtained therefor and by actual service on him within the State, the court acquires jurisdiction of him to the extent that the attached property is subject to any judgment that may be rendered against him.—GIBSON v. EVERETT, S. Car., 19 S. E. Rep. 286.

7. BANKS AND BANKING — Collections. — Under an agreement between plaintiff bank and the H bank that the latter should collect notes and checks forwarded it by plaintiff for a commission, and remit daily, the relation of principal and agent as to any paper ceased on collection, and the relation of creditor and debtor as to the cash immediately arose.—FIRST NAT. BANK OF RICHMOND v. DAVIS, N. Car., 19 S. E. Rep. 280.

8. BANKS AND BANKING—Trust Fund.—K delivered to a bank a certain sum of money, to be paid over to W when he should present to the bank a warranty deed, properly executed, conveying to K certain lands, together with an abstract showing good title in W, and took a receipt from the bank reciting the purpose for which the money was so left. Subsequently, and before such deed and abstract were presented, or the money paid over, the bank failed, and a receiver was appointed by the court: Held that the money so deposited was a trust fund, and did not become assets of the bank, nor pass to the receiver as such.—KIMMEL v. DICKSON, S. Dak., 52 N. W. Rep. 561.

9. BOARD OF EDUCATION—Powers.—Const. art. 9, § 10, giving the board of education power to make regulations as to the public schools and State educational funds, subject to amendment or repeal by the general assembly, does not empower the board to apportion money raised by taxation in the different counties for school purposes, and retained in their several treasuries in accordance with an act of the general assembly. — BOARD OF EDUCATION OF DUPLIN COUNTY v. STATE BOARD OF EDUCATION, N. Car., 19 S. E. Rep. 277.

10. BUILDING AND LOAN ASSOCIATION — Receiver — Shareholder.—A shareholder in a building and loan association, whose officers have so mismanaged its affairs that its assets amount to less than two-thirds of the capital paid in, is entitled to have the corporate assets placed in the hands of a receiver.—TOWLE v. AMERICAN BLDG. LOAN & INV. SOC., Ill., 60 Fed. Rep. 131.

11. CARRIERS— Failure to Deliver Goods—Damages.—A carrier, by failure to transport and deliver freight within a reasonable time, is not liable for the profits which the owner would have made had the property been delivered within a reasonable time.—BOWDEN v. SAN ANTONIO & A. P. RY. CO., Tex., 25 S. W. Rep. 987.

12. CARRIERS OF PASSENGERS—Injury— Pleading.—A complaint against a railroad company which alleges the defendant is a common carrier, and that, while plaintiff was on defendant's cattle car, the car was backed so violently against another car that plaintiff was thrown down and injured, but which fails to show what relation plaintiff bore to defendant, is demurrable.—GULF, C. & S. F. RY. CO. v. GORMAN, Tex., 25 S. W. Rep. 992.

13. CARRIERS OF PASSENGERS—Injury—Street Railway.—In an action against a street railway company for personal injuries, an instruction that defendant was bound to use towards plaintiff, if a passenger, the high degree of care that would be used by very prudent persons under like circumstances, and defendant was liable for even the slightest neglect to use such care, is proper.—BISCHOFF v. PEOPLE'S RY. CO., Mo., 25 S. W. Rep. 903.

14. CERTIORARI—Immaterial Matters.—A writ of *certiorari* will be denied, though the trial judge is willing to amend the record, where it does not appear that the additional matter is material or relevant, nor that it was omitted by mistake or inadvertence.—CITY NAT. BANK OF NORFOLK v. BRIDGERS, N. Car., 19 S. E. Rep. 276.

15. CHATTEL MORTGAGES — Filing and Recording.—Under Sayles' Civ. St. art. 3190*b*, providing that, where the possession of the property is not changed, a chattel mortgage shall be void as against subsequent purchasers, unless it is filed in the county clerk's office, the failure of the clerk to enter the mortgage in the proper book after it has been filed with him does not

affect the rights of the mortgagee.—CLEVELAND v. EMPIRE MILLS, Tex., 25 S. W. Rep. 1055.

16. CONSTITUTIONAL LAW—Interstate Commerce Act—Self Incrimination.—Act Feb. 11, 1893, which declares that no person shall be excused from testifying or producing documents in proceedings based upon the interstate commerce act on the ground that it may tend to criminate him, but that he shall not be prosecuted or punished on account of any matter concerning which he may testify, violates the fourth and fifth amendments to the United States Constitution, which declare that the right of the people to be secure against unreasonable searches and seizures shall not be violated, and that no person shall be compelled in any criminal case to be a witness against himself.—UNITED STATES v. JAMES, U. S. D. C. (Ill.), 60 Fed. Rep. 257.

17. CONTRACT — Logging— Abandonment.—When an entire contract to lumber several tracts of land is broken by the owner's sale of the one tract out of which the contractors expected to make their profit, these are not obliged to finish the other tracts in order to a suit on the contract or else recover merely for money expended and the value of work done, but may abandon, and recover, as damages for the breach, the profits they would have made on the whole job.—LEE v. BRIGGS, Mich., 58 N. W. Rep. 477.

18. CONVERSION — Damages.—Where the jury on the trial of an inquisition of damages may, "if they shall think fit," give damages, in the nature of interest, above the value of the goods at the time of the conversion (Rev. St. 1889, § 4430), the allowance of such interest to the owner of goods wrongfully seized by the sheriff is in the discretion of the jury.—STATE v. HOPE, Mo., 25 S. W. Rep. 893.

19. CONVERSION—Limitations—Damages.—Where defendant and his vendors had held a mare in good faith for more than two years before suit for conversion thereof, it was error to charge the jury that if the mare, in the first instance, was stolen, the plea of the statute of limitations was tainted.—HULL v. DAVIDSON, Tex., 25 S. W. Rep. 1047.

20. CORPORATIONS—Stockholders— Unpaid Stock.—C and other directors of a corporation issued to themselves paid-up shares for over one-half the amount of the authorized stock, but paid nothing therefor. They afterwards agreed that they would bear certain assessments on their stock to pay debts of the company, and such stock was then assessed. C failed to pay his assessments, and after demand surrendered all his stock except 100 shares, which he had hypothecated, and agreed to surrender such shares as soon as he got control of them: Held, that there was sufficient consideration for C's promise to surrender such shares, and that his assignee, who took the stock with notice of the facts, could not collect of the company dividends declared on its stock.—HILL v. ATOKA COAL & MIN. CO., Mo., 25 S. W. Rep. 926.

21. CORPORATIONS — Void Ordinance — Estoppel.—A grant, by ordinance, to a street-railway company, was extended, by subsequent ordinance imposing new obligations, to a period beyond the limit of the corporate life of the company. The franchises of the company were thereafter transferred in turn to two different corporations, whose charters did not expire within the term of the extended grant: Held, that the extended grant was void upon the ground that it could not exceed the normal life of the original company, and that the enforcement of new obligations, discharged at great expense by the new companies, would not estop the city, a view of statutory restrictions, from denying a grant in the streets by any other act than an ordinance "duly enacted for the purpose."—CITY OF DETROIT v. DETROIT CITY RY. CO., U. S. C. C. (Mich.), 60 Fed. Rep. 191.

22. COUNTY TREASURER—Limitation.—An action by a county against its treasurer by reason of a double credit to himself for refunded taxes is not within Rev. St. 1894, § 301, deferring the running of the statute till discovery of a cause of action, where the person liable conceals the fact that, all the facts and figures being shown by his books, and the commissioners, with whom he is obliged to settle annually, having power to audit his books, and to hire an expert to aid them in examining his accounts.—BOARD OF COM'RS OF DEARBORN COUNTY v. LODS, Ind., 36 N. E. Rep. 772.

23. CRIMINAL LAW — Affray—Burden of Proof.—On trial for an affray, where defendant admits fighting with a deadly weapon, the burden is on defendant to show facts justifying his conduct.—STATE v. BARRINGER, N. Car., 19 S. E. Rep. 275.

24. CRIMINAL LAW — Assault — Evidence.—Evidence that defendant pointed a pistol at complainant with threats to shoot him, without proof that the pistol was loaded, does not justify a conviction of an assault, which, by Rev. St. 1894, § 1983, is an unlawful attempt, coupled with a present ability, to commit a violent injury.—KLEIN v. STATE, Ind., 36 N. E. Rep. 763.

25. CRIMINAL LAW—False Pretenses.—Where one, by falsehood and artifice, involving co-operation and connivance with a confederate, obtains from a third person a bill of sale to personal property and possession of the property, whereby the owner is defrauded and cheated, an accusation charging the facts specifically, and supported by evidence, is sustainable; the offense committed being a misdemeanor, under section 4595 of the Code.—JONES v. STATE, Ga., 19 S. E. Rep. 250.

26. CRIMINAL LAW — Homicide — Previous Threats.—Previous threats are no excuse for homicide unless one has reasonable ground for belief, and actually believes, that the maker is then and there attempting to carry them out.—BAILEY v. COMMONWEALTH, Ky., 25 S. W. Rep. 883.

27. CRIMINAL LAW—Larceny — Recent Possession.—The court charged that the unexplained possession of the stolen property by an alleged accomplice was "a strong circumstance tending to show" that the accomplice stole it, and that the jury should acquit defendant, unless the evidence tended to connect him with the crime: Held, that the error in charging on the weight of the evidence was prejudicial to defendant, since the charge was not made on the theory that, if the accomplice were guilty, then defendant was innocent, but assumed that both might be guilty.—DENMARK v. STATE, Ark., 25 S. W. Rep. 867.

28. CRIMINAL LAW—Murder—Degrees.—One who intentionally and unjustifiably, but without deliberation, kills another, is guilty of murder in the second degree if the killing was not done in an attempt to commit a felony.—SLATE v. FAIRLANB, Mo., 25 S. W. Rep. 895.

29. CRIMINAL LAW—Embezzlement.—Where an indictment charged that defendant "did convert to his own use, and embezzle," a check, an instruction that defendant was guilty if he received the check and misapplied it fraudulently, whether he converted it to his own use or not, was proper.—STATE v. FOUST, N. Car., 19 S. E. Rep. 275.

30. CRIMINAL PRACTICE—Homicide—Misnomer of Deceased.—The indictment charging Charles Herron with the murder of "Lula Herring, his wife" judgment will not be arrested on a verdict of guilty because the name of the wife was spelled "Herring" instead of "Herron."—HERRON v. STATE, Ga., 19 S. E. Rep. 243.

31. DEED—Construction.—Where the owner of platted land dedicates the streets to the public, reserving the minerals therein, with the right to mine the same, and afterwards conveys the abutting lots merely by number, without reservation, the rights reserved by the deed of dedication pass to the grantee of the lots.—SNODDY v. BOLEN, Mo., 25 S. W. Rep. 932.

32. DEEDS—Partnership.—A deed made to a partnership in the firm name, without naming as grantees the individual partners, is good in equity, and, by implication, vests in the members of the firm the power to convey; and hence such deed is admissible, as a muniment of title, in favor of one who claims title to the land in question through the grantee of such partner-

ship.—DUNLAP v. GREEN, U. S. C. C. of App., 60 Fed. Rep. 242.

33. DOWER—Partnership Lands. — Two persons who jointly buy land, each furnishing half the price, with the understanding that the profits on sale thereof shall be divided between them, are not, therefore, partners in the land, so as to bar their widows' dower in it.—SHIPP v. SNYDER, Mo., 25 S. W. Rep. 900.

34. EJECTMENT—Issues Raised by Pleadings.—Where the complain alleged facts entitling plaintiff to the possession of land, and the answer set up equities on which defendants demanded relief, and the reply admitted a bond for title to defendant's intestate, and offered to convey on payment of the purchase price, and defendants alleged that the price had been paid, issues tendered by plaintiff without reference to the right of defendants to the land on payment of the price were properly refused.—ALLEN v. ALLEN, N. C., 19 S. E. Rep. 269.

35. EJECTMENT—Presumptions—Deed.—A deed, regular upon its face, made by the county judge of the proper county as a conveyance by him, as trustee, of a certain lot, under the town-site law, is presumptively valid and authorized, without affirmative proof that all conditions which should precede the making of such deed have been complied with.—GOLDBERG v. KIDD, S. Dak., 58 N. W. Rep. 574.

36. EMINENT DOMAIN — Condemnation of Land.—A judgment condemning land for railway purposes, and assessing the damages, bars any further action for damages resulting from the lawful use by the railroad company of the land condemned, though not for such as arise from negligence, bad management, or want of skill in such use.—SAN ANTONIO & A. P. RY. CO. v. LOUGORIO, Tex., 25 S. W. Rep. 1020.

37. EMINENT DOMAIN—Railroad Right of Way.—Though the appropriation of land by a railroad company is complete when it pays into court the amount of damages awarded by commissioners and takes possession, it may on a subsequent trial, before a jury, on appeal from the award, announce the plans on which the road will be constructed, with a view to obtaining a reduction of damages, in the absence of any statute requiring it to announce such plans to the commissioners.—ST. LOUIS, K. & N. W. RY. CO. v. CLARK, Mo., 25 S. W. Rep. 906.

38. EQUITY — Cancellation of Contracts. — A person cannot have a conveyance made by him set aside on the ground that the consideration was in part the dismissal of a criminal prosecution, and therefore illegal, when he himself procured such dismissal, the prosecution being against him, as he cannot thus set up his own illegal acts.—TEAGUE v. WILLIAMS, Tex., 25 S. W. Rep. 1048.

39. EXECUTORS AND TRUSTEES — Commissions and Salary.—Where a will appoints the same persons executors and trustees, and provides that one of them, who managed the estate during testator's life, should receive the same salary as formerly, independent of his commissions as trustee, he is entitled to the salary for the time he acts as executor, and before qualifying as trustee.—LITTLE v. LITTLE, Mass., 36 N. E. Rep. 795.

40. EXPERT EVIDENCE.—A witness, who is not an expert, may give his opinion as to the value of property, where he is acquainted with values in the vicinity; and he need not have personal knowledge of the particular thing to whose value he testifies.—TERRE HAUTE & I. R. CO. v. JARVIS, Ind., 36 N. E. Rep. 774.

41. FEDERAL COURTS—Circuit Court of Appeals.—An order made for the purpose of executing a decree, after an appeal from such decree has been perfected, but reserving final action until a commissioner should report his proceedings to the court at a subsequent term, is not subject to review on appeal. — GUNN v. BLACK, U. S. C. C. of App., 60 Fed. Rep. 159.

42. FEDERAL COURTS—Jurisdiction—Chose in Action. —A county subscribed for stock in a railroad company, to be paid by an issue of county bonds under an act which prescribed that the bonds, when executed, "shall be deposited with the trustee, to be held in escrow and to be delivered to the said railroad company when it shall have become entitled to the same" by compliance with the prescribed conditions upon which the subscription was made: Held, where the bonds were withheld by the trustee, upon compliance with the conditions, that the right of the railroad company was one "to recover the contents of a chose in action" (Act Cong. Aug. 1888), and therefore, where the railroad company and the trustee are citizens of the same State, an assignee of the company cannot sue to recover the bonds in a Federal Court. — JACKSON & SHARP CO. v. PEARSON, U. S. C. C. (Ky.), 60 Fed. Rep. 113.

43. FEDERAL OFFENSE—Guardian—Powers—Insurance Policy. — The acceptance by a father, as guardian, at the end of the tontine period, of the surrender value of a tontine dividend policy on his life, payable to his child, is the collection of a debt due in the alternative at the option of the guardian, and neither a compromise nor a sale, under Rev. Code, §§ 2065, 2106, 2110, providing for previous approval by the court.—MACLAY v. EQUITABLE LIFE ASSUR. SOC., U. S. S. C., 14 S. C. Rep. 678.

44. FRAUDULENT CONVEYANCES—Deed of Trust—Reservation.—A deed of trust, for the benefit of sureties of the grantor on notes given for money borrowed by him, conveying his storehouse, the fixtures and goods therein, and other personal property, but not including a farm owned by him, provided that it should become void on payment of the notes, and that in case of default in such payment the trustee, on request of the beneficiaries, should sell the property, and pay them the proceeds in proportion to the amounts for which each might be surety at the time of sale, holding the remainder subject to the grantor's order. There was no express reservation of possession; and the trustee took possession immediately: Held, that the instrument, being in reality a chattel mortgage, was not fraudulent, notwithstanding the reservation of the surplus to the grantor. — HUNTLEY v. KINGMAN & CO., U. S. S. C., 14 S. C. Rep. 688.

45. FRAUDULENT CONVEYANCE—Chattel Mortgages.— When a chattel mortgage stipulates that he may, or the mortgagee knowingly allows the mortgagor to, retain possession of and sell the mortgaged goods in the usual course of trade, without any agreement or understanding as to the disposition of the proceeds, the mortgage is presumptively fraudulent.—BLACK HILLS MERCANTILE CO. v. GARDINER, S. Dak., 58 N. W. Rep. 557.

46. FRAUDULENT CONVEYANCES—Judgment Notes.— Judgment notes, purposely given to preferred creditors for the sums largely in excess of the amounts due them, and afterwards satisfied in full, are fraudulent as to other creditors thereby prevented from receiving payment.—HARDT v. HEIDWEYER, U. S. S. C., 14 S. C. Rep. 671.

47. FRAUDULENT CONVEYANCE — Knowledge of Grantees.—The intention by the grantee in a trust deed, given to secure pre-existing debts, to defraud other creditors, does not render the deed void unless the beneficiaries participate in the fraud.—KRAUS v. HAAS, Tex., 25 S. W. Rep. 1025.

48. FRAUDULENT CONVEYANCES—Laches of Creditors. —Debtors assigned their property to C for the purpose of paying creditors, and on a former appeal it was found that the transfer hindered and delayed creditors, and was void as to them, but that because they, with a knowledge of all the facts, delayed for several years to assert their rights, C would be required to account to them only for the interest of the debtors in the property: Held that, in an accounting, C was properly charged only with what he had actually received for the property, and not with its estimate value.—CUTCHEON v. CORBITT, Mich., 58 N. W. Rep. 479.

49. FRAUDULENT CONVEYANCES — Retention of Possession.—Retention of possession of a chattel by the vendor is *prima facie* fraudulent, as against creditors;

and if explanation is offered by the vendee the court should charge as to the presumption, and leave the reasonableness of the explanation to the jury.—LANDMAN v. GLOVER, Tex., 25 S. W. Rep. 994.

50. FRAUDULENT CONVEYANCE— What Constitutes.—An insolvent gave a creditor a bill of sale of goods worth $975, in consideration of the cancellation of a debt of $633, and $200 cash, to enable the grantor to flee the State to avoid arrest under an indictment: Held, that the sale was void as to other creditors of the grantor, and whose existence the grantee had knowledge. — WILLIAMS v. MOORE, Tex., 25 S. W. Rep. 1010.

51. FEDERAL OFFENSE— Conspiracy to Defraud.—An indictment under Rev. St. § 5440, punishing conspiracy to defraud the United States where one or more of the parties "do any act to effect the object of the conspiracy" contained several counts charging the conspiracy in substantially the same language, but each charging a different overt act. A nolle was entered as to some counts, and a verdict of guilty was rendered on all the others except one: Held, that the acquittal on one count was not a finding against any conspiracy, which would work an acquittal as to all.—DEALY v. UNITED STATES, U. S. S. C., 14 S. C. Rep. 680.

52. HIGHWAYS—Discontinuance.—Proceedings of the board of supervisors discontinuing a highway through plaintiff's land, with reference to which all his buildings were located, are void where no notice was given him, and no hearing had.—CURRY v. ROZELL, Mich., 58 N. W. Rep. 472.

53. HIGHWAYS—Proceedings to Establish.—Proceedings to establish a road on the county line and the corporate line of a town are not vitiated by the failure of the former owner of some of the land appropriated to release it, when he has conveyed it to the town for a road, and expresses a willingness to relinquish it for the purposes of the road.—IN RE ESSEX AVE., Mo., 25 S. W. Rep. 891.

54. HOMESTEAD— Exemption. — The homestead exemption to the head of a family is governed by the law in force at the time the debt, to the payment of which it is sought to be subjected, was created.—TRIMMIER v. WINSMITH, S. Car., 19 S. E. Rep. 283.

55. HUSBAND AND WIFE—Wife as Surety.—By section 2590, Comp. Laws, which provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried," a married woman is authorized to execute a promissory note with her husband; and she is liable thereon, though the note is given for the individual debt of the husband.—MILLER v. PURCHASE, S. Dak., 58 N. W. Rep. 556.

56. INFANCY—Goods Obtained by Fraud.—In an action against a minor for goods sold and delivered to her pursuant to a bargain made by the father, who, with her knowledge and consent, was using her name, and doing business under it, under such circumstances that person dealing with her might suppose that her father was the one who owned the business, it is reversible error to refuse to submit to the jury the question whether the minor obtained the goods by fraud, since, if such were the case, she would be liable for the price.—HARSEIM v. COHEN, Tex., 25 S. W. Rep. 977.

57. INNKEEPER.— While an innkeeper may not assume the full and ordinary innkeeper's liability with respect to the goods of a traveling salesman who is a guest, and which are kept and displayed in a sample room furnished by such innkeeper, he is liable for injury to such goods resulting directly from his want of ordinary care with respect to the same.—SCHEFFER v. CORSON, S. Dak., 58 N. W. Rep. 555.

58. INSURANCE POLICY—Complaint.—In an action on an insurance policy, the complaint need not set out a copy of the application on which the policy was issued.—INDIANA FARMERS' LIVE-STOCK INS. CO. v. BYRKETT, Ind., 36 N. E. Rep. 779.

59. INSURANCE POLICY— Construction.—A clause in a policy providing for the insurance of premises for a certain period, while occupied for saddlery purposes, does not make a mere change of occupation avoid the policy, where it contains another provision avoiding it if the risk be increased by change of occupation.—EAST TEXAS FIRE INS. CO. v. KEMPNER, Tex., 25 S. W. Rep. 999.

60. JUDGMENTS — Service of Process.—Though the judgment of a court of general jurisdiction recites that the defendants were duly cited by publication, as required by law, the presumption in favor of the judgment, thence arising, cannot prevail against the return of the sheriff and the actual publication, where they appear in the record and are insufficient.—NEWTON v. CROWLS, U. S. C. C. of App., 60 Fed. Rep. 220.

61. JUSTICE COURT — New Trial—Notice.—Under a statute allowing the losing party to a case in justice court to move the justice for a new trial at any time within five days of the entry of judgment, notice to the other party of the motion must specify the time and place of hearing.—ASHE v. STATE, S. Car., 19 S. E. Rep. 297.

62. LANDLORD AND TENANT— Lease—Construction.—Under a lease authorizing the tenant to remove his buildings "at the end" of the term, he is entitled to ingress and egress for a reasonable time after the expiration of the lease to remove his property.—DAVIDSON v. CRUMP MANUF'G CO., Mich., 58 N. W. Rep. 475.

63. LANDLORD AND TENANT—Leases—Surrender.—The fact that a lessor, on receipt through the mail of a letter stating that the lessee proposed to vacate, and inclosing the key, and rent to date, took possession, attempted to rent, and sent no notice to the lessee, does not constitute an acceptance of the surrender.—JOSLIN v. MCLEAN, Mich., 58 N. W. Rep. 467.

64. LIBEL— Letters — Publication.—Letters sent in envelopes stamped, "Bad Collecting Agency," left open, so that they are read before reaching their destination, stating, among other things, that the correctness of the claim against the addressee is guaranteed, and that a list is furnished merchants of those who will not pay their debts, is libelous *per se*, so that special damages need not be pleaded in an action thereon.—BURTON v. O'NIELL, Tex., 25 S. W. Rep. 1013.

65. LIMITATIONS — Effect of Bankruptcy.—Where a person acknowledged the validity of a judgment in a petition in bankruptcy, the statute began to run from the date of such acknowledgment.—LAUDERDALE v. MAHON, S. Car., 19 S. E. Rep. 294.

66. MASTER AND SERVANT — Assumption of Risk.—Where a servant was injured by being caught in a set screw which projected a little beyond the pulleys and belt, but was almost in their line of motion, the fact that he was not told about the set screw does not make the master liable, when the servant knew that the pulleys, belt, and shaft were dangerous.—ROONEY v. SEWALL & DAY CORDAGE CO., Mass., 36 N. E. Rep. 789.

67. MECHANIC'S LIEN—Abandonment of Lien.—Where contractors employed to erect a building were discharged before its completion, having been paid all that was then due, and no further sum became due under the contract, a subcontractor, who had furnished labor, but who did not give notice of his claim till after the discharge, was not entitled to a lien.—DUDLEY v. JONES, Tex., 25 S. W. Rep. 994.

68. MECHANIC'S LIENS— Parol Evidence.—An unexecuted agreement to take a mortgage as security for the identical debt, on premises upon which a claimant is entitled to a lien for labor and material furnished, is not sufficient to defeat a mechanic's lien, when, in the same contract, the parties agree in express terms that the right should not thus be waived, and it further affirmatively appears that the owner, by alienating the property, has made a compliance on his part as to the execution of the mortgage impossible.—BARNARD & LEAS MANUF'G CO. v. GALLOWAY, S. Dak., 58 S. W. Rep. 565.

69. MUNICIPAL BONDS—Validity—Ordinance.—Where bonds are issued under Gen. St. Kan. 1889, par. 961, which declares that cities may "borrow money and issue bonds therefor" whenever "the city council shall be instructed so to do" by vote of the inhabitants, it is no objection to the validity of such bonds that the council submitted the matter to the electors by means of a resolution, rather than ordinance, where there is nothing in the statutes expressly requiring an ordinance in such case.—CITY OF ALMA v. GUARANTY SAV. BANK, U. S. C. C. of App., 60 Fed. Rep. 203.

70. MUNICIPAL CORPORATIONS — Bonds—Limit of Indebtedness.—Const. Tex. art. 11, §§ 5, 7, provide that no city shall ever incur a debt for any purpose or in any manner, unless at the same time provisions is made for levying and collecting a tax sufficient to pay the interest, and a sinking fund of at least 2 per cent. per annum. Article 8, § 9, provides that the tax to be levied for the erection of public buildings and other permanent improvements shall not exceed 25 cents of the $100 valuation in any one year: Held, that the power of a city to create debts for such purposes is limited to a sum upon which the interest, together with 2 per cent. for the sinking fund, will not exceed the revenue derived from a tax of 25 cents on the $100. —MILLSAPS v. CITY OF TERRELL, U. S. C. C. of App., 60 Fed. Rep. 193.

71. MUNICIPAL CORPORATIONS — Changing Grade of Street—Notice.—A notice must be given by a city of proceedings to assess the damage to property which will be caused by a proposed change of the grade of a street in said city, and of the time and place where the appraisers appointed for the purpose of assessing such damages will meet, in order that the owner of the property so damaged may have an opportunity to be heard in his own behalf.—MCGAVOCK v. CITY OF OMAHA, Neb., 58 N. W. Rep. 543.

72. MUNICIPAL CORPORATIONS — Defective Streets—Limitations.—Act Iowa, Feb. 17, 1888, which limits to six months a right of action against cities for injuries resulting from defective sidewalks, unless notice is served on the city within 90 days from the injury, applies as well to infants as to adults.—MORGAN v. CITY OF DES MOINES, U. S. C. C. of App., 60 Fed. Rep. 208.

73. MUNICIPAL CORPORATIONS—Injuries from Trolley Pole.—A city is not liable to a passenger on an electric street car, who is struck and injured by a trolley pole placed in the gutter, near the track, where the city neither fixed the location of the track and poles nor owned them; the injury being caused by a defect in the street-car system, and not by the condition of the street.—KENNEDY v. CITY OF LANSING, Mich., 58 N. W. Rep. 476.

74. MUNICIPAL CORPORATIONS—Obstruction of Street. —Where, in a suit against a city by one injured by the fall of lumber piled in a street contrary to ordinance, the city impleads the person who piled the lumber, and the evidence shows that lumber had been piled there for years, and that the attention of the city officers had been called to the matter, it is proper to refuse an instruction which assumes that the city, if liable to the plaintiff, would be entitled to recover against the other defendant, since it is not shown beyond controversy that the city did not consciously participate in the wrongful act.—CITY OF GALVESTON v. GONZALES, Tex., 25 S. W. Rep. 978.

75. MUNICIPAL CORPORATIONS — Street Grade—Ratification.—Where defendant, assuming to act for the city, changed the grade of a street, and removed therefrom plaintiff's wall, which encroached thereon so as to constitute a nuisance, and the city ratified his acts after suit brought, plaintiff could recover only for injury resulting during the time between the act and the ratification.—WOLFE v. PEARSON, N. Car., 19 S. E. Rep. 264.

76. NEGLIGENCE—Death of Minor—Damages.—Punitive damages cannot be awarded against the owner of a store, where a teamster opens a door into the elevator shaft, and is injured by stepping into it; the injury not being willful, and there being no gross negligence in failing to keep the door fastened during business hours, or to give notice that it opened into the shaft, and not into the store.—LEAHY v. DAVIS, Mo., 25 S. W. Rep. 941.

77. NEGLIGENCE — Injury to Gaming Implements.— The fact that property is only used for gambling purposes is no defense to an action for a negligent injury thereto.—GULF, C. & S. F. RY. CO. v. JOHNSON, Tex., 25 S. W. Rep. 1015.

78. NEGLIGENCE—Question for Jury.—It is the settled rule in this State that where different minds may reasonably draw different inferences from the same state of facts, as to whether such facts establish negligence or contributory negligence, the question of negligence must be left to the jury.—OMAHA ST. RY. CO. v. LOEHNEISEN, Neb., 58 N. W. Rep. 535.

79. NEGOTIABLE INSTRUMENT — Defense.—An answer in an action on a note alleged plaintiff's agreement to cancel it on defendant's surrender of premises mortgaged to secure it, and defendant's performance of the agreement, and that six years had elapsed since the making thereof through plaintiff's attorney, and the attorney's death. It did not allege that defendant ever demanded the note or took any steps to compel performance of the agreement, nor give any excuse for delay: Held, that the answer was insufficient.—WENDOVER v. BAKER, Mo., 25 S. W. Rep. 916.

80. NEGOTIABLE INSTRUMENT—Defenses — Bona Fide Holders. — Defendant gave negotiable notes to a life insurance company's agent, the notes to be returned if policies were not issued on defendant's application. The agent agreed to exchange the notes with plaintiff for land if policies were issued, and, after issuance thereof, the exchange was effected: Held, that it was no defense to an action on the notes that defendant was induced by the agent to apply for a distribution policy when he intended to apply for an endowment policy, and that it was agreed that the notes should not be used till the policies were delivered and found satisfactory; it not being shown that plaintiff knew of such representations and understanding.—DONOVAN v. FOX, Mo., 25 S. W. Rep. 915.

81. NEGOTIABLE INSTRUMENT — Election — Attorney's Fees.—Where each of a series of notes contains a stipulation that default in the payment of any one of them shall, at the holder's election, mature all of them, the institution of suit on all the notes, within a reasonable time after default in payment of one, is sufficient notice of the holder's election.—KERR v. MORRISON, Tex., 25 S. W. Rep. 1011.

82. NEGOTIABLE INSTRUMENTS—Payments without Indorsement.—Payments to the original payee of a negotiable note, made before its maturity, and without requiring its production and their indorsement thereon, cannot be set up by the maker as against a *bona fide* purchaser.—BIGGERSTAFF v. MARSTON, Mass., 36 N. E. Rep. 785.

83. NEGOTIABLE INSTRUMENT — Recoupment. — The answer in this case, which is based on a promissory note, admits all that is essential to a recovery of the full amount claimed, but alleges an affirmative defense to a portion thereof, growing out of a breach of warranty of the property for which the note was given: Held, that the statute of this State fully sustains the answer, and sanctions the doctrine of recoupment involved therein, when the action is between the original parties, or those standing in their place.—LANEY v. INGALS, S. Dak., 58 N. W. Rep. 572.

84. NEGOTIABLE INSTRUMENT—Several Payees—Pleading.—Where a note is to payable two persons, "or either of them," either may recover thereon, and it is immaterial whether an assignment to the suing payee from the other was without consideration, or was made to defraud creditors.—HOPKINS v. HALLIBURTON, Tex., 25 S. W. Rep. 1005.

85. NOVATION — Evidence. — Defendant, holding a mortgage upon a stock of goods of his brother, who

was also indebted to plaintiff, took possession of it, pursuant to a family arrangement that he should close out the stock, and pay plaintiff's debt, and that his brother should go home, and care for their father. Plaintiff threatening to attach, defendant promised to pay the debt, whereupon plaintiff desisted, released the original debtor, and looked to defendant for payment: Held, that there was a novation or substitution of debtors.—GRIEB v. COMSTOCK, Mich., 58 N. W. Rep. 497.

86. OFFICERS—Public Officers—Compensation.—Compensation of a public officer fixed by a provision that "each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance," is not "salary" within the meaning of section 20, art. 2, of the constitution, which provides, that. "The general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."—GOBRECHT v. CITY OF CINCINNATI, Ohio, 36 N. E. Rep. 782.

87. PARTNERSHIP AGREEMENT.—A contract by which defendants, in consideration of plaintiffs' services, and the use of their factory, agree to give them one-half the commissions to be earned in a certain transaction, does not, as between themselves, constitute a partnership.—FUQUA v. MASSIE, Ky., 25 S. W. Rep. 875.

88. PARTNERSHIP—Contribution.—Where a firm dissolved and quit business, except the settlement of partnership accounts, in 1854, and G, one of the partners, died in 1868, and the other partner, J, died in 1870, and it appeared that prior to July, 1869, J had settled all outstanding partnership debts, except one which was settled thereafter by his administrator, who brought suit in 1886 against G's personal representative for contribution on account thereof, the burden is on defendant therein to show that the estate which paid the judgment had partnership assets not disbursed in the settlement of partnership accounts.—JOHNSON v. PECK, Ark., 25 S. W. Rep. 865.

89. PARTNERSHIP—Dissolution.—A resident managing partner, who is charged with the duty of winding up the partnership affairs and selling its property, is the agent and trustee of his non resident copartner; and it is a breach of trust for him to become interested as a purchaser of such property, either alone or with others, without his partner's knowledge, or to make profits out of the property at his partner's expense, and by so doing he renders himself liable to account for the full value of the property at the time of the sale.—GUNN v. BLACK, U. S. C. C. of App., 60 Fed. Rep. 151.

90. PARTNERSHIP—Individual Creditors.—The assets of an insolvent firm, before dissolution, may, with the consent of all the partners, be applied to the satisfaction of all the individual debts of the members of the firm, when done in good faith.—IN RE EDWARDS, Mo., 25 S. W. Rep. 904.

91. PARTNERSHIP — Retirement—Notice.—Where one sued as a member of a firm seeks to avoid liability on the ground of retirement from the firm before the indebtedness, he cannot show notice to plaintiff by testimony of a witness that the dissolution was generally known.—BROWN v. FOSTER, S. Car., 19 S. E. Rep. 299.

92. PLEADING — Reply. — Under Mansf. Dig. Ark. §§ 5043, 5072, which forbid a plaintiff to reply to new matter contained in the answer, unless such new matter constitutes a set-off or counterclaim, a plaintiff may prove, without pleading them, facts showing that the defendant has waived, and is estopped from asserting, breaches by plaintiff of the contract sued on, such breaches having been averred in the answer by way of confession and avoidance— BURLINGTON INS. CO. v. MILLER, U. S. C. C. of App., 60 Fed. Rep. 255.

93. PUBLIC LANDS—Pre-emption—Occupancy.—Under the Texas land laws, the pre-emptor of land losses his right thereto, as against a subsequent patentee, where he fails to file the required proof of his occupancy in the land office before such patentee locates his certificate.—WOOD v. COLLINS, U. S. C. C. of App., 60 Fed. Rep. 139.

94. PUBLIC LANDS—Rights of Applicant.—Under Act April 8, 1889, ch. 56, § 8, giving a *bona fide* settler who has bought one section of agricultural land the right to buy three pastoral sections, such a settler, who has applied to purchase pastoral sections, and whose application has been refused because the commissioner of the general land office has wrongfully sold the land to another, may bring trespass to try title against such wrongful purchaser.—BURNETT v. WINBURN, Tex., 25 S. W. Rep. 969.

95. RAILROAD COMPANIES—Accident at Crossing.—It is the duty of every railroad company in this State to properly construct and maintain in good repair crossings over all public highways on the line of its road, so that the same will be safe and convenient for travelers, so far as it can do so without interferring with the safe operation of the railroad. If a railroad company in that regard is negligent, by reason whereof a person, without fault, is injured while traveling over a defective crossing, the corporation owning and operating such railroad is liable for the damages sustained.—OMAHA & R. V. R. CO. v. RYBURN, Neb., 58 N. W. Rep. 541.

96. RAILROAD COMPANY—Damages—Mental Suffering.—In suit against a railroad company for the action of its sectionmen in dumping rock and dirt on and into plaintiff's dwelling, which was partly on defendant's right of way, it is proper to allow for mental suffering caused by the insults and indignities offered by such employees, and for wife's sickness resulting therefrom.—FT. WORTH & N. O. RY. CO. v. SMITH, Tex., 25 S. W. Rep. 1032.

97. RAILROAD COMPANY — Negligence — Excessive Speed.—In an action against a railroad for personal injuries caused by a train running at an unlawful rate of speed, it is error to charge that there is a presumption that such excessive speed caused the injury, that being a question purely for the jury.—BLUEDORN v. MO. PAC. RY. CO., Mo., 25 S. W. Rep. 943.

98. RAILROAD COMPANY— Negligence— Persons on Track.—The engineer of a moving train may presume, till the contrary appears, that a person on the track will leave it in time.—PITTSBURGH, C. C. & ST. L. RY. CO. v. JUDD, Ind., 36 N. E. Rep. 775.

99. RECEIVER—Negligent Killing.—A receiver is not a "proprietor, owner, charterer, or hirer," within Rev. St. Tex. art. 2899, giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of their servants or agents.—ALLEN v. DILLINGHAM, U. S. C. C. of App., 60 Fed. Rep. 176.

100. RAILROAD COMPANIES—Overflowing Land—Measure of Damages.—The measure of damages for the destruction of a growing crop is its value at the time and place that it was destroyed.—GULF, C. & S. F. RY. CO. v. CARTER, Tex., 25 S. W. Rep. 1023.

101. RAILROAD COMPANY—Stock-killing Cases.—In an action against a railroad company for killing a horse, where the complaint does not allege that it was killed in the county where the action was commenced, the defect is jurisdictional, and is not reached by demurrer alleging insufficiency of facts to show a cause of action.—LOUISVILLE, N. A. & C. RY. CO. v. JOHNSON, Ind., 36 N. E. Rep. 766.

102. RAILROAD COMPANY—Street Railways—Injury to Child.—In an action against a street railway company for causing the death of a child, by being run over by a car, if such injury could have been avoided by the exercise of ordinary care by the driver, the plaintiff can recover although she was guilty of negligence, in permitting him to escape upon the street.—CZEKEWZKA v. BENTON BELFOUNTAIN RY. CO., Mo., 25 S. W. Rep. 911.

103. SALE— Rescission— Misrepresentations.—Representations as to the effectiveness of a mechanical equivalent, made to a person experienced in the sale of the article, who has every chance to make tests, and the opinion of an expert to guide him, though in fact false, are no ground for equitable rescission of a sale of the patent right.—WADE v. RINGO, Mo., 25 S. W. Rep. 901.

104. SET-OFF—Failure to Deliver Goods.—A breach of a contract to deliver horses in trade at an agreed valuation is sufficiently certain to be pleaded as a counterclaim in an action on a note.—FIRST NAT. BANK OF ARLINGTON, OR., v. LYNCH, Tex., 25 S. W. Rep. 1042.

105. SHERIFFS AND CONSTABLES— Executions.—A mere indorsement of a return upon an execution does not avoid the liability of the sheriff for failure to make an actual return to the clerk within the time required by law.—WILSON v. YOUNG, Ark., 25 S. W. Rep. 870.

106. TAXATION — Omitted Property—Procedure.—Under Rev. St. 1881, § 6416, providing that before the auditor shall correct the tax duplicate so as to cover property omitted in any past year, if the person claiming to own, or in possession of, such property, resides in the county, he shall notify him, in writing, of his intention to make such correction, the notice is sufficient if it describes the property in general terms.—REYNOLDS v. BOWEN, Ind., 36 N. E. Rep. 756.

107. TAX TITLES — Collateral Attack.—In ejectment, when defendant claims under a tax deed, the tax roll and return of the township are inadmissible to show the invalidity of the tax.—WATTS v. BUBLITZ, Mich., 58 N. W. Rep. 465.

108.—TELEGRAPH COMPANIES — Damages.—Mental anguish is an element of damages, within contemplation as a natural result of unreasonable delay in delivering a message notifying a daughter of her father's dangerous illness.—WESTERN UNION TEL. CO. v. JOBE, Tex., 25 S. W. Rep. 1036.

109. TELEGRAPH COMPANIES—Failure to Deliver Message.—Under a statute subjecting telegraph companies to a penalty for failure to make prompt delivery of messages, a company is subject to action for such failure, whether the message was delivered to it for transmission directly by the sender, or by another telegraph company to whom the sender had delivered it, and which, after transmitting it over its own line, delivered it to the defendant company, by whom the transmission was completed.—CONYERS v. POSTAL TELEGRAPH CABLE CO., Ga., 19 S. E. Rep. 253.

110. TRESPASS — Damages — Evidence.—Where, in trespass against a railroad company for building its track on plaintiff's land, the issue is as to the existence, before suit was brought, of an implied license by plaintiff, it is not error to admit evidence of the acts and statements of plaintiff after the action was brought, tending to show the existence of such license prior thereto.—KEANE v. OLD COLONY R. CO., Mass., 36 N. E. Rep. 788.

111. TRESPASS TO TRY TITLE—Deed—Mortgage.—Evidence that the grantor of a deed, acknowledged by him as such, was informed by one who acted as interpreter, the grantor being ignorant of English, that the instrument was a mortgage, was inadmissible to prove that the deed was intended as a mortgage, since the certificate of acknowledgment was conclusive of the facts therein stated, no fraud being alleged on the part of the grantee.—HERRING v. WHITE, Tex., 25 S. W. Rep. 1017.

112. TRIAL—Verdict—Correctness.—Where, after adjourning court till the next morning, it is found that a verdict is "$6.00" in figures and "six hundred dollars" in letters, there is no error in recalling them the same night, and having them correct it, such correction being made before the verdict was recorded on the journals by the clerk.—DEVORE v. GEIGER, S. Car., 19 S. C. Rep. 288.

113. TRUSTEE—Powers.—A conveyance to a trustee, with power to sell and make title on written consent of *cestui que trust*, admits of the equitable enforcement of a sale with such consent, by a substituted trustee, who has never received a deed from the trustee named.—COLEMAN-BUSH INV. CO. v. FIGG, Ky., 25 S. W. Rep. 883.

114. USURY—Collateral Mortgage.—Where a national bank loans money at a usurious rate, which is included in the note in an action to enforce the contract the interest is forfeited.—MCGHEE v. FIRST NAT. BANK OF TOBIAS, Neb., 58 N. W. Rep. 537.

115. VENDOR'S LIEN.—Where, in lieu of the original notes given for the price of land, another is given, and it is afterwards agreed that the grantee shall pay the interest upon the original notes in lieu of the latter, the grantor retains the equitable lien on the land for the payment of such interest.—JOHNSON v. BETTERTON, Tex., 25 S. W. Rep. 1050.

116. VENDOR AND PURCHASER—Bona Fide Purchaser.—Henri Rueg, owner of a large tract of unoccupied lands in the State of Texas, died, leaving a posthumous child as his sole heir. His brother and sister executed a deed for the tract, in which they were described as "the only surviving heirs at law of the above mentioned Henri Rueg:" Held, that the grantors had no semblance of title, either legal or equitable, and that the grantee, who had paid full value for the land, and taxes thereon for many years thereafter, was not entitled to protection as an innocent purchaser without notice.—TEXAS LUMBER MANUF'G CO. v. BRANCH, U. S. C. C. of App., 60 Fed Rep. 201.

117. VENDOR AND PURCHASER — Recovery of Money Paid.—Before a vendee under a contract for the purchase of land, can recover bank money paid on the contract, he must show that he has performed the contract on his part, or tendered the amount to the vendor under the the terms of the contract, or he must establish the fact that the contract has been rescinded by the parties.—WAY v. JOHNSON, S. Dak., 58 N. W. Rep. 552.

118. WARRANTY—Joint Devisees—Partition.—The implied warranty, between partitioners, of property devised to them jointly, avails their heirs, but after alienation avails neither them, their heirs, nor alienees.—JONES v. BIGSTAFF, Ky., 25 S. W. Rep. 889.

119. WILL—Estate Tail.—A devise to one "for and during his life, and after his death to his sons and their heirs forever, equally to be divided among them," does not create a fee tail, in the absence of anything in the context to show that such was testator's intention.—WALKER'S ADM'R v. LEWIS, Va., 19 S. E. Rep. 258.

120. WILLS — Rights of Devisees —Election.—Where testator, by specific, independent devised to his wife and several children, has assumed to dispose, not only of his own lands, but also of lands standing in his name, and in fact owned by himself and some of his children as partners, and these decline to take under the will, and establish their title by suit, testator's liquidated interest in the partnership assets is not distributable to said partners who have taken nothing under the will, as property as to which testator died intestate, but must be applied first to satisfy the disappointed devisees for the deficits in their devises occasioned by the partners' election.—COLVERT v. WOOD, Tenn., 25 S. W. Rep. 963.

121. WITNESS — Cross-Examination.—Ordinarily the cross examination of a witness should be restricted to matters brought out on his examination in chief. If it is desired to examine the witness upon other matters, the cross-examining party must make the witness his own, and call him as such.—HURLBUT v. HALL, Neb., 58 N. W. Rep. 538.

122. WITNESS—Refreshing Memory.—A manager of a firm's business, as a witness, cannot refresh his memory as to an indebtedness to the firm from its account books, when he did not make the entries, or see them made, nor assure himself of their correctness when the matters were fresh in his memory.—FRITZ v. BURGISS, S. Car., 19 S. E. Rep. 304.